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No. 91-164-CFX
Status: GRANTED

Title: United States, Petitioner
v.
Thompson/Center Arms Company

Docketed:
July 26, 1991

Court: United States Court of Appeals for the Federal Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Halbrook,Stephen

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Entry	Date	Note	Proceedings and Orders
1	Jun 18 1991	G	Application (A90-956) to extend the time to file a petition for a writ of certiorari from June 27, 1991 to July 27, 1991, submitted to The Chief Justice.
2	Jun 19 1991		Application (A90-956) granted by the Chief Justice extending the time to file until July 27, 1991.
3	Jun 21 1991		Response to application (A90-956) filed by respondent Thompson/Center Arms.
4	Jul 26 1991	G	Petition for writ of certiorari filed.
5	Aug 20 1991		Brief of respondent Thomspon/Center Arms Company in opposition filed.
6	Aug 21 1991		DISTRIBUTED. September 30, 1991
7	Aug 30 1991	X	Reply brief of petitioner United States filed.
8	Oct 7 1991		Petition GRANTED.
			**********
9	Oct 18 1991	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
10	Nov 4 1991		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
11	Nov 20 1991		SET FOR ARGUMENT MONDAY, JANUARY 13, 1992. (2ND CASE)
12	Nov 20 1991		Brief of petitioner United States filed.
13	Nov 27 1991		CIRCULATED.
15	Dec 19 1991	X	Brief of respondent Thomspon/Center Arms Company filed.
14	Dec 20 1991	X	Brief amicus curiae of Senators Craig, Symms and Smith filed.
16	Jan 6 1992	X	Reply brief of petitioner United States filed.
17	Jan 7 1992		Record filed.
		*	Certified record and briefs United States Court of Appeals for the Federal Circuit.
18	Jan 8 1992		Record filed.
		*	Original record and exhibits United States Claims Court.(1 Box)
19	Jan 13 1992		ARGUED.

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91-164

No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

THOMPSON/CENTER ARMS COMPANY,
A Division of the K.W. THOMPSON
TOOL COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Respondent manufactures pistols and "conversion kits" that allow the pistols readily to be converted into rifles with 10-inch barrels. Under the National Firearms Act, a manufacturer who "makes" a rifle with a barrel shorter than 16 inches (a short-barrel rifle) must register the firearm in the National Firearms Registry and pay a tax of $200. 26 U.S.C. 5841, 5845(a)(3).

The question presented in this case is whether respondent "makes" a short-barrel rifle by distributing the pistol together with the conversion kit and is therefore required to register the firearm and pay the tax due under the National Firearms Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutes involved	2
Statement	2
Reasons for granting the petition	5
Conclusion	16
Appendix A	1a
Appendix B	18a
Appendix C	33a
Appendix D	34a
Appendix E	35a

TABLE OF AUTHORITIES

Cases:

Haynes v. *United States*, 390 U.S. 85 (1968) 7
United States v. *Alpers*, 338 U.S. 680 (1950) 12
United States v. *Combs*, 762 F.2d 1343 (9th Cir. 1985) 14
United States v. *Catanzaro*, 368 F. Supp. 450 (D. Conn. 1973) 9
United States v. *Drasen*, 845 F.2d 731 (7th Cir.), cert. denied, 488 U.S. 909 (1988) 5, 6, 7, 9, 10, 11, 15, 16
United States v. *Endicott*, 803 F.2d 506 (9th Cir. 1986) 10, 12, 13, 15
United States v. *Kokin*, 365 F.2d 595 (3d Cir.), cert. denied, 385 U.S. 987 (1966) 11, 15
United States v. *Luce*, 726 F.2d 47 (1st Cir. 1984) 8, 13, 15
United States v. *Smith*, 477 F.2d 399 (8th Cir. 1973) 9
United States v. *Thompson*, 202 F. Supp. 503 (N.D. Cal. 1962) 9
United States v. *Woods*, 560 F.2d 660 (5th Cir. 1977) 7-8, 11, 12, 15

Statutes and regulations:

Firearms Owners' Protection Act, Pub. L. No. 99-308, § 101, 100 Stat. 449 13-14

Statutes and regulations—Continued:	Page
National Firearms Act, 26 U.S.C. 5801 *et seq.*:	
26 U.S.C. 5801 (a) (1)	4
26 U.S.C. 5821	2, 3
26 U.S.C. 5821 (a)	4, 35a
26 U.S.C. 5822	4
26 U.S.C. 5841	2, 35a
26 U.S.C. 5841 (b)	13
26 U.S.C. 5842 (b)	3
26 U.S.C. 5845	2
26 U.S.C. 5845 (a)	13, 35a
26 U.S.C. 5845 (a) (3)	2, 3, 5-6, 7, 10, 11, 12, 13, 14, 35a
26 U.S.C. 5845 (a) (7)	10, 13, 36a
26 U.S.C. 5845 (b)	5, 10
26 U.S.C. 5845 (c)	2, 5, 6, 7, 9, 36a
26 U.S.C. 5845 (c) (3)	7
26 U.S.C. 5845 (f)	5, 10
26 U.S.C. 5845 (i)	7, 36a
26 U.S.C. 5861	2, 36a
26 U.S.C. 5861 (d)	3
18 U.S.C. 921 (a) (2)	13
Miscellaneous:	
H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954)	6
S. Rep. No. 1501, 90th Cong., 2d Sess. (1968)	9, 11

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THOMPSON/CENTER ARMS COMPANY,
A Division of the K.W. THOMPSON
TOOL COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 924 F. 2d 1041. The petition for rehearing and suggestion of rehearing en banc were denied without opinion (App., *infra*, 33a, 34a). The opinion of the Claims Court (App., *infra*, 18a-32a) is reported at 19 Cl. Ct. 725.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1991. The order denying the petition for rehearing was entered on March 29, 1991 (App., *infra*, 33a). The Chief Justice extended the time for filing a petition for a writ of certiorari to and including July 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Sections 5821, 5841, 5845 and 5861 of the National Firearms Act, as amended, 26 U.S.C. 5821, 5841, 5845, 5861, are set forth in the Appendix, *infra*, 35a-37a.

STATEMENT

1. The Thompson/Center Arms Company (Thompson) manufactures a pistol (the "Contender" model) with a receiver that is designed, as a commercially attractive feature, to accept interchangeable barrels of differing lengths and calibers. Thompson also manufactures a "conversion kit" that includes a long barrel and a rifle stock that may be attached to the Contender pistol receiver to convert it into a rifle (App., *infra*, 2a). If the shorter, pistol-length barrel is not removed from the receiver when the rifle stock is added, however, the resulting combination is a "short-barrel rifle" that falls within the definition of a "firearm" under Section 5845(a)(3) of the National Firearms Act, 26 U.S.C. 5845(a)(3).[1] The

[1] The Contender pistol has a 10-inch barrel (App., *infra*, 2a). A "rifle" results when the stock is added to the pistol receiver, for the weapon in that form is designed "to be fired from the shoulder" (26 U.S.C. 5845(c)). A "rifle"

maker of a "firearm," as so defined, is required to pay a tax of $200 for each weapon and register it in the National Firearms Registry. 26 U.S.C. 5821, 5842(b). Moreover, it is a crime punishable by a fine of up to $10,000, or imprisonment for up to ten years, or both, for a person "to receive or possess" a "firearm" if it "is not registered to him" (26 U.S.C. 5861(d)).

The conversion kit manufactured by Thompson is quick and easy to use.[2] By employing "simple, readily available tools," "a short barrel rifle could be assembled in less than five minutes—even more easily and readily than a long barrel rifle—since the barrels would not have to be changed" (App., *infra*, 29a).

In 1985, Thompson was advised by the Bureau of Alcohol, Tobacco and Firearms ("BATF") that, when the conversion kit was possessed or distributed with the Contender pistol, the unit constituted a firearm subject to the Act (App., *infra*, 3a).[3] In response to this advice, Thompson submitted an Application to Make and Register a Firearm and paid the applicable $200 tax for the making of a single such firearm (App., *infra*, 21a). The application sought permission "to make, use, and segregate as a single

with a barrel less than 16 inches long (commonly referred to as a "short barrel rifle") is a "firearm" subject to the registration and tax requirements of the National Firearms Act. 26 U.S.C. 5845(a)(3).

[2] Indeed, the process is so simple that, in a demonstration conducted in open court, counsel for respondent was able to alter the pistol into a short-barrel rifle in a matter of a few minutes (App., *infra*, 29a).

[3] BATF also informed Thompson, however, that the separate marketing of a *complete* pistol and a *complete* carbine would not by itself fall within the scope of the Act (App., *infra*, 3a).

unit" a package consisting of a serially numbered pistol together with a shoulder stock and a 21-inch barrel.[4] BATF approved the application. Thompson then filed a tax refund claim, asserting that the unit it had registered was not a "firearm" because the component parts of the Contender pistol and conversion kit had not been assembled by Thompson as a short-barrel rifle (*id.* at 22a).

2. When the refund application was not approved, Thompson commenced this action in the Claims Court. The court held that the Contender pistol, when possessed together with the conversion kit, constituted a short-barrel rifle and was therefore a "firearm" under the Act (App., *infra*, 18a-32a). The court specifically rejected Thompson's argument that the component parts of the pistol and kit must first be assembled as a short-barrel rifle before they could be deemed to be a firearm (*id.* at 29a-30a). The court concluded that both the language of Section 5845 and its legislative history, together with the relevant case law and "ordinary common sense," lead "inexorably to [the] conclusion that the Contender pistol in conjunction with the [conversion kit] is a firearm under the National Firearms Act" (App., *infra*, 31a). The court therefore granted summary judgment to the government (*id.* at 32a).

[4] Under the National Firearms Act, a manufacturer must first make application and receive permission from the Treasury Department to make a firearm subject to the requirements of the Act. 26 U.S.C. 5822. Thompson elected not to seek qualification as a firearms manufacturer under 26 U.S.C. 5801(a)(1) (which requires payment of an occupational tax of $1000) and instead sought permission to make firearms as a non-qualified manufacturer under 26 U.S.C. 5821(a) (which requires payment of a $200 tax for each firearm made).

3. The court of appeals reversed. The court concluded that a short-barrel rifle "actually must be assembled" (App., *infra*, 4a-5a) in order to be "made" within the meaning of the statute (*id.* at 6a). The court based its conclusion on the statutory description of a short-barrel rifle as one "having" a barrel less than 16 inches in length (26 U.S.C. 5845(c)) and stated that such a "firearm must exist in fact, not in contemplation, to be 'made' within the meaning of the statute" (App., *infra*, 5a). The court noted that other provisions of the Act require the registration of any "combinations of parts" used to convert an unregulated weapon into a machine gun or other "destructive device" (26 U.S.C. 5845(b) and (f)), but the statute does not require registration of a "combination of parts" for use in converting a weapon into a short-barrel rifle (App., *infra*, 7a-8a). The court of appeals acknowledged that, in *United States* v. *Drasen*, 845 F.2d 731, cert. denied, 488 U.S. 909 (1988), the Seventh Circuit had "held that complete but unassembled short-barrel rifle parts kits were 'rifles' within the meaning of Section 5845(c)" (App., *infra*, 17a). The court concluded, however, that, to the extent "that *Drasen* is inconsistent with our conclusion here, we decline to follow it" (*ibid.*).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals drastically erodes the civil and criminal prohibitions of the National Firearms Act by allowing clearly regulated weapons to escape registration by the simple artifice of maintaining the weapon in partially unassembled form. In holding that the pistol and conversion kit do not constitute a "firearm" under Section 5845

(a)(3) of the National Firearms Act unless they have been actually assembled by a purchaser in the form of a short-barrel rifle, the decision conflicts with the holding of the Seventh Circuit in *United States* v. *Drasen*, 845 F.2d at 736-737, that complete, but unassembled, rifle kits constitute firearms within the meaning of the Act. Since the issue presented in this case has exceptional administrative importance, and since the courts of appeals have reached conflicting interpretations of the statute, review by this Court is warranted.

1. The court of appeals' holding in this case necessarily extends beyond the factual context of single-shot firearms such as the Contender. That is because the National Firearms Act does not draw distinctions based on repeater capability, magazine capacity, caliber or criminal appeal in imposing its registration and tax requirements. While the ultimate function of the Act is to reduce the accessibility of weapons used "by criminals or gangsters" (H.R. Rep. No. 1337, 83d Cong., 2d Sess. A395 (1954)), it necessarily does so through broadly inclusive classifications.

In particular, Section 5845(a)(3) of the Act includes within the definition of a regulated "firearm" *any* "rifle having a barrel or barrels of less than 16 inches in length." 26 U.S.C. 5845(a)(3). A "rifle," in turn, is defined broadly in Section 5845(c) as:

> a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

26 U.S.C. 5845(c). The Act requires any person who makes such a weapon to register it, and the term "make" is, in turn, broadly defined in Section 5845(i) to "include":

> manufacturing * * * putting together, altering, any combination of these, or otherwise producing a firearm.

26 U.S.C. 5845(i). As this Court has observed, in order to accomplish the comprehensive objectives of the statute, "the acts of making and transferring firearms are broadly defined" under the National Firearms Act. *Haynes* v. *United States*, 390 U.S. 85, 88 (1968).

When all of the parts necessary to assemble a rifle are produced and held in conjunction with one another, a "rifle" is the result. A unit that includes a receiver, a 10-inch barrel, and a shoulder stock, is literally a weapon "designed * * * and intended to be fired from the shoulder" with "a barrel or barrels of less than 16 inches in length." 26 U.S.C. 5845(a)(3) and (c). The fact that it may be possessed and sold in a partially unassembled state does not render it any less a "firearm" within the contemplation of the Act. See *United States* v. *Drasen*, 845 F.2d at 737.

By concluding that a firearm is not "made" until it is fully assembled (App., *infra*, 4a), the court of appeals failed to follow the plain language and evident meaning of the statute. As the Seventh Circuit concluded in *United States* v. *Drasen*, *supra*, by placing the registration and tax requirements on persons "manufacturing * * * or otherwise producing a firearm" (26 U.S.C. 5845(i)), the statute applies quite directly to manufacturers who distribute "a complete parts kit ready to be assembled." 845 F.2d at 737. See also *United States* v. *Woods*, 560 F.2d

660, 665 (5th Cir. 1977) (the statute "does not specify that the parts must be assembled before it applies"); *United States* v. *Luce*, 726 F.2d 47, 49 (1st Cir. 1984) ("Congress clearly intended this common sense interpretation"). After all, many ordinary products (including rifles and shotguns) are commonly sold in a partially unassembled state, and to say that a product thus produced has not been "made" until it has been fully assembled by the purchaser runs counter to "ordinary common sense" (App., *infra*, 31a).[5]

Indeed, to conclude that a manufacturer does not "make" a firearm if the weapon is shipped and sold in a partially unassembled state is as unpersuasive as arguing that a bicycle manufacturer does not "make" a bicycle if it is shipped or sold with the handlebars and seat unattached. See note 5, *supra*. If a firearms manufacturer packages as a unit all of the parts needed readily to assemble a firearm, the manufacturer has "made" a firearm in any ordinary sense of the term. See *United States* v. *Woods*, 560 F.2d at 665 ("to reason otherwise would be to frustrate or defeat the very purpose of the statute"). If the contrary were true, any manufacturer would be able to avoid the tax and registration requirements of the Act by the rudimentary artifice of marketing its products in a "kit" form that requires some assembly by the purchaser.

2. The court of appeals erred in its reliance on other portions of the statute in forming its conclusion

[5] For example, rifles are packaged, shipped and sold with their bolts (and sometimes other parts) detached. Shotguns are manufactured and marketed with removable barrels. But it could hardly be said that gun manufacturers such as Remington Arms, Uzi and Thompson therefore do not "manufacture" guns. That would be like saying that Schwinn does not "manufacture" bicycles.

that a short-barrel rifle is not "made" until it is fully assembled by the purchaser.

a. The statute defines a "rifle" to "*include* any such weapon which may be readily restored to fire a fixed cartridge." 26 U.S.C. 5845(c) (emphasis supplied). The court of appeals reasoned that, if a firearm was deemed "made" without complete assembly, then the additional statutory coverage of firearms that "may be readily restored" to use would be superfluous (App., *infra*, 6a).

That reasoning is erroneous. A complete but partially unassembled weapon, such as the Contender with its conversion kit, is a "rifle" because, when fully assembled, it falls squarely within the definition of a rifle. A weapon that once was a rifle, but which now lacks some essential component—such as a firing pin—is "*include*[*d*]" within the statutory definition of a "rifle" if it "may be readily restored" to use (26 U.S.C. 5845(c)).[6] See *United States* v. *Smith*, 477 F.2d 399 (8th Cir. 1973) (per curiam) (even though the barrel was welded shut, it could be "readily restored" to use in eight hours); *United States* v. *Catanzaro*, 368 F. Supp. 450, 452 n.3, 453 (D. Conn. 1973) (weapon could be "readily restored" to use in "approximately one hour").[7]

[6] In adding the "readily restored" language to the statute, "Congress specifically intended to overcome *United States* v. *Thompson*, 202 F. Supp. 503 (N.D. Cal. 1962), holding that a firearm with a missing firing pin was not a firearm under the Act." *United States* v. *Drasen*, 845 F.2d at 736 (citing S. Rep. No. 1501, 90th Cong., 2d Sess. 46 (1968)).

[7] By contrast, the Contender model and conversion kit can be assembled into a short-barrel rifle in less than five minutes (App., *infra*, 29a).

Indeed, the statutory inclusion of incomplete or non-functioning firearms that can be "readily restored" to use *supports* the conclusion that the statute also applies to complete, but partially unassembled firearms kits. There is no reason to suppose that Congress would have intended to "include" weapons that require hours of reassembly within the definition of a "rifle" but exclude weapons that require "only a brief and a minimal effort * * * to assemble" from the manufacturer's kit. *United States* v. *Endicott*, 803 F.2d 506, 508 (9th Cir. 1986). As the Seventh Circuit concluded in rejecting this same argument, a "rifle that has been disassembled for some reason is clearly in the same category as an identical collection of rifle parts that has not yet been assembled. The statute covers both." *United States* v. *Drasen*, 845 F.2d at 736.

b. The statutory definitions of "machine guns," "destructive devices," and "silencers" differ from the statutory definition of "rifle" in that the former include any "combination of parts" that can be used to convert a non-regulated weapon into the regulated form. Compare 26 U.S.C. 5845(b) and (f), 5845 (a)(7), with 26 U.S.C. 5845(a)(3). In this case, the court of appeals reasoned that Congress must have intended to exclude a "conversion kit" from the definition of a short-barrel rifle since it chose not to regulate a "combination of parts" that could be used to convert a non-regulated weapon into such a "rifle" (App., *infra*, 7a-8a).

The court's analysis, however, misperceived the very issue before it in this case. The conversion kit *by itself* might indeed be said to be a "combination of parts" intended for use in converting a non-regulated weapon to regulated form, but this case does not present the question whether the Thompson conversion

kit is regulated *by itself* as a firearm under the Act.[8] Instead, this case presents the question whether the conversion kit *when possessed or distributed together with the pistol*—in a unit that constitutes a complete, partially unassembled short-barrel rifle—is regulated as a firearm under the Act. 26 U.S.C. 5845(a)(3). As the Seventh Circuit stated in *United States* v. *Drasen*, 845 F.2d at 737, "we are concerned [in this case] only with a complete parts kit for short barrel rifles." With respect to a complete parts kit, the courts of appeals consistently have held heretofore that "the statute does not specify that the parts must be assembled before the statute applies." *United States* v. *Woods*, 560 F.2d at 665. See also *United States* v. *Kokin*, 365 F.2d at 596.

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[8] Congress evidently perceived "machineguns" and other "destructive devices" to be so inherently dangerous that it provided that a conversion kit that could be used to create such weapons is itself regulated under the Act. See S. Rep. No. 1501, *supra*, at 45-46 (referring to the "combination of parts" used to convert a weapon to a machine gun as a "so-called conversion kit[]"). As the Seventh Circuit stated in *United States* v. *Drasen*, 845 F. 2d at 737:

> Parts for [weapons such as machine guns and destructive devices], which are regulated without limitation, are therefore parts with only one purpose, so that a single part could reasonably be subject to regulation.

The statutory inclusion of "conversion kits" used for making "machineguns" or other "destructive devices" is not a basis for excluding a "complete parts kit" used for a short-barrel rifle under the Act. *Ibid.* For example, in *United States* v. *Kokin*, 365 F.2d 595 (3d Cir.), cert. denied, 385 U.S. 987 (1966), which was decided before the "combination of parts" language was added to the statutory definition of "machinegun," the court held that an unregulated carbine "together with all the parts necessary to convert it into * * * [a] machine gun" constituted a regulated "machine gun" under the Act. *Id.* at 596.

3. In reaching its conclusion that a complete parts kit—which takes less than five minutes to assemble into a short-barrel rifle—is not a "firearm" under the Act, the court of appeals ignored this Court's admonition that the language of a statute should "not be distorted under the guise of construction, or so limited by construction as to defeat the manifest intent of Congress." *United States* v. *Alpers*, 338 U.S. 680, 681-682 (1950). Despite the court of appeals' attempted assurances to the contrary (App., *infra*, 16a-17a), the decision in this case also quite plainly conflicts with decisions of the other courts of appeals.

Prior to the decision in this case, the courts of appeals had uniformly held that a complete, but partially unassembled, weapon constitutes a "firearm" under the Act. See, *e.g.*, *United States* v. *Drasen*, 845 F.2d at 736-737; *United States* v. *Endicott*, 803 F.2d 506, 508 (9th Cir. 1986) (a complete kit to make a silencer is regulated "although its parts are not assembled * * * [if] only a brief and a minimal effort is required to assemble the complete design by reason of the nature and location of the parts"); *United States* v. *Woods*, 560 F.2d at 665. In so ruling, these courts specifically addressed and rejected the very arguments that the court of appeals accepted in this case. See, *e.g.*, *ibid.* (the statute "does not specify that the parts must be assembled before it applies").

Notwithstanding these clearly contrary decisions, the only opinion that the court of appeals acknowledged to be "arguably inconsistent" (App., *infra*, 17a) with its analysis was *United States* v. *Drasen*, *supra*. In *Drasen*, the Seventh Circuit concluded that a complete, but partially unassembled rifle kit, "which might or might not be assembled to form a short-barrel rifle" (845 F.2d at 732), is a "firearm" within the meaning of the Act.[9] The *Drasen* court specifically rejected the claim—accepted by the court of appeals in this case—that "the statute did not cover unassembled rifles that had never been assembled" (*ibid.*). The fact that the partially unassembled kit could readily be assembled into a regulated firearm was sufficient to bring the weapon within the scope of the Act. *Id.* at 735 ("[c]ommon sense permits no other conclusion").

The decision in this case also conflicts with the reasoning of *United States* v. *Luce*, 726 F. at 49, and *United States* v. *Endicott*, 803 F. 2d at 508, where the courts held that unassembled component parts of "silencers" constitute "firearms" within the meaning of the Act (26 U.S.C. 5845(a)(7)). As the First Circuit stated in *United States* v. *Luce*, 726 F.2d at 48-49:[10]

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[9] The court of appeals erred in stating that *Drasen* is distinguishable from the present case on the ground that the parts kits in *Drasen* "could *only* be assembled as illegal firearms" (App., *infra*, 17a). The *Drasen* court specifically applied the statute to unassembled kits that "might or might not" be assembled in the form of a regulated firearm. See 845 F.2d at 732. Moreover, the court's purported distinction of *Drasen* has no bearing on whether a complete but partially unassembled kit falls within the "firearm" definition of the Act. When a weapon falls within the scope of the "firearm" definition, the fact that it might also have a non-regulated form would not be a basis for failing to comply with the registration and tax requirements of the Act. See 26 U.S.C. 5841(b), 5845(a).

[10] At the time *Luce* and *Endicott* were decided, the statutory definition of a silencer did *not* include the "combination of parts" language used in connection with other regulated devices. Compare 18 U.S.C. 921(a)(24) (added by the Firearms Owners' Protection Act, Pub. L. No. 99-308, § 101,

> Though [Section] 5845(a) does not expressly define 'silencer' to include component parts of a silencer that are 'readily available [and assembled] with only a brief and minimal effort,' we agree with the district court that Congress clearly intended this common sense interpretation.

The court of appeals attempted to distinguish *Luce* and *Endicott* on the ground that the short-barrel Contender rifle, unlike the silencers involved in those cases, is not a "ganster-type" device (App., *infra*, 15a). But Congress did not limit its broad definition of "rifles" to weapons that are subjectively dangerous, reprehensible or powerful. A short-barrel rifle is regulated without regard to the purported sporting interests of its manufacturer or the court's perception of the suitability of the weapon for criminal purposes. The plain language of the statute simply does not permit the distinction between "good" and "bad" short-barrel rifles that the court of appeals seeks to draw. See 26 U.S.C. 5845(a)(3) (regulating all rifles "having a barrel or barrels of less than 16 inches in length"). Whether the short-barrel rifle is an Uzi (see *United States* v. *Combs*, 762 F.2d 1343 (9th Cir. 1985)) or a Thompson is not relevant under the Act: what is relevant is that the rifle has a short barrel.[11]

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100 Stat. 449). The courts there nevertheless held that an unassembled silencer is a firearm under the Act. See also note 8, *supra*.

[11] The court of appeals erred in relying (App., *infra*, 17a-18a) on *United States* v. *Combs*, 762 F.2d 1343 (9th Cir. 1985), for the proposition that the weapon must be fully assembled to constitute a "firearm." In that case, the defendant was found in possession of an Uzi carbine that already had a short-barrel attached to it. *Id.* at 1345. No

4. The decision of the court of appeals poses a serious threat to civil and criminal enforcement of the National Firearms Act. While the court of appeals apparently believed that this case merely presented the question of *who* pays the excise tax (the manufacturer or the purchaser who assembles the firearm) (App., *infra*, 4a), the opinion drastically diminishes the breadth of the statute by requiring that a firearm be fully assembled to be subject to regulation (App., *infra*, 5a). Since the same statutory definitions apply equally to the civil and criminal enforcement sections of the Act, it is obvious that this decision will be relied upon by defendants who will claim that the government must now prove that the complete, but partially unassembled weapon found in their possession had once been fully assembled in the form of a regulated firearm.[12] Manufacturers and importers of regulated firearms can be expected to seek to circumvent the Act in like manner. The comprehensive statutory scheme that Congress sought to erect would be rendered quite ineffective by the simple expedient of partial disassembly.

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one has ever questioned that a firearm is "made" if a short-barrel is already attached to the rifle. The question presented in this case, which the Ninth Circuit had no need to consider in *Combs*, is whether a pistol possessed together with a conversion kit that enables the pistol to be readily converted into a short-barrel rifle constitutes a "firearm," regardless of whether the parts have actually been assembled in that form.

[12] As the cases cited in this brief reflect, prosecutions under the National Firearms Act quite often involve weapons that are recovered in a partially unassembled state. See *United States* v. *Drasen*, 845 F.2d at 736-737; *United States* v. *Endicott*, 803 F.2d at 508; *United States* v. *Luce*, 726 F.2d at 49; *United States* v. *Woods*, 560 F.2d at 665; *United States* v. *Kokin*, 365 F.2d at 596.

Requiring criminal prosecutions to depend upon the fortuity of recovering a cache of "fully assembled" weapons would frustrate the important statutory purpose of discouraging trafficking in potentially dangerous firearms. While the Thompson short-barrel rifle is not itself a weapon of mass destruction, it would be simple enough to drive an Uzi through the eye of the Federal Circuit's needle. Congress manifestly never intended the "nonsensical" result that only fully assembled weapons come within the purview of the Act. See *United States* v. *Drasen*, 845 F.2d at 736.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-5091

THOMPSON/CENTER ARMS COMPANY,
a Division of the K.W. THOMPSON
TOOL COMPANY, INC., PLAINTIFF-APPELLANT

v.

THE UNITED STATES, DEFENDANT-APPELLEE

Appealed from: U.S. Claims Court
Judge Margolis

DECIDED: January 30, 1991

Before RICH, MAYER, and MICHEL, *Circuit Judges.*

MAYER, *Circuit Judge.*

OPINION

Thompson/Center Arms Company, a division of the K.W. Thompson Tool Company, Inc. (Thompson), appeals the judgment of the United States Claims Court dismissing its tax refund complaint. *See* 19 Cl. Ct. 725 (1990). We reverse.

Background

Thompson is a federally licensed sporting arms manufacturer. It has designed and manufactures for hunting, target shooting, and other sporting purposes a single shot pistol with a 10 inch barrel called a "Contender". For a brief period in 1985, Thompson also manufactured a "Contender Carbine Kit" consisting of a 21 inch barrel, a wooden foreend, and a shoulder stock. Other manufacturers had been selling similar conversion kits for the Contender since the late 1960s. Using Thompson's kit and the receiver of the Contender pistol, a purchaser can convert the pistol to a single shot carbine rifle with either a 21 inch or 10 inch barrel. The kit instructions, packaging, and advertising contain detailed warnings that making a carbine rifle with the 10 inch barrel is a violation of federal law. In addition, Thompson printed the phrase "Warning. Federal Law prohibits use with barrel less than 16 inches" on each carbine shoulder stock.

Thompson included the warnings on the advice of Rex Davis, in 1971 the Acting Director of the Alcohol, Tobacco, and Firearms Division of the Internal Revenue Service in the Department of the Treasury (ATF). In January of 1971, Thompson's president had written ATF and asked whether it would be legal to use the Contender pistol receiver with an 18 inch barrel and full shoulder stock to make a single shot carbine. Davis replied that "the manufacture of a carbine . . . by utilizing a pistol action[] would be legal and the firearm so produced would not come within the purview of the National Firearms Act [26 U.S.C. §§ 5801-72 (1988)]." However, he suggested that "it would be in the public interest" for

Thompson to include warnings like those accompanying the Contender carbine kit.

Thompson interpreted Davis's opinion as encompassing its Contender pistol and carbine conversion kit. The agency interpreted it differently. Shortly after Thompson began producing its kit in 1985, the Director of the Bureau of Alcohol, Tobacco and Firearms (BATF, formerly ATF), informed it that the kit and pistol together were a firearm subject to the National Firearms Act. In BATF's opinion, possession of an unassembled kit with a Contender pistol was the same as possession of "a rifle having a barrel or barrels less than 16 inches in length," which section 5845(a)(3) of the Act defines as a "firearm" and to which the $200 "making" tax of section 5821 therefore applies. *See* 26 U.S.C. §§ 5821, 5845 (1988). However, BATF conceded that a complete 21 inch carbine rifle and complete pistol—each with its own receiver—do not come within the Act unless *actually assembled* as a "firearm", like a short-barreled "rifle", defined in section 5845.

When BATF adhered to this position on reconsideration, Thompson stopped producing the Contender carbine kit and filed suit in federal district court seeking a declaratory judgment that the pistol and kit were not a "firearm" as defined in the National Firearms Act. The court dismissed for lack of subject matter jurisdiction, noting that Thompson had to pay the disputed tax and file an administrative claim for refund before suing for a refund. *Thompson/Center Arms Co. v. Baker*, 686 F. Supp. 38, 43 (D.N.H. 1988). Thompson subsequently paid the section 5821 tax and filed a refund claim with BATF. When BATF failed to act on the claim for more than six months, Thompson invoked the Tucker Act, 28 U.S.C. § 1491 (1988), and sued for a refund

in the Claims Court. On cross motions for summary judgment, the court agreed with BATF: the Contender pistol, when possessed in conjunction with the carbine kit, is a "firearm" as defined in section 5845(a)(3). 19 Cl. Ct. at 731. Accordingly, it dismissed the complaint and Thompson appeals.

Discussion

Section 5821 of the National Firearms Act (NFA or Act) requires any person making a firearm to pay a $200 tax on each. 26 U.S.C. § 5821 (1988). The question in this case is who "makes" a NFA "firearm" and therefore is liable for the tax [1]: Thompson, when it separately manufactures the Contender pistol and carbine conversion kit, or the person possessing both a pistol and kit, when and if he actually assembles a 10 inch rifle? In our view, the National Firearms Act answers, "the latter."

A. The Current Act

26 U.S.C. § 5845(a) (1988) defines "firearm" to include "(3) a rifle *having* a barrel or barrels of less than 16 inches in length; (4) a weapon *made* from a rifle if such weapon *as modified* has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length." *Id.* (emphasis added). The emphasized words strongly suggest that, to meet either definition, a short-barreled rifle [2] actually must

[1] The Act imposes several other requirements on persons making or dealing in firearms, but none is relevant here. *See* 26 U.S.C. §§ 5801 (occupational tax), 5811 (transfer tax), 5841 (firearms registration); *see also* 686 F. Supp. at 39.

[2] We use the term "short-barreled rifle" to describe a weapon meeting the definition in either section 5845(a)(3) or (a)(4). *Cf.* 18 U.S.C. § 921(a)(8) (Gun Control Act definition of "short-barreled rifle").

be assembled. Congress knows the difference between "*could* have," "*could* be made," and "*could* be modified," on the one hand, and the terms and phrases it chose to use, on the other.

Section 5845(c) supports this common-sense interpretation. It defines "rifle" as:

> a weapon *designed* or redesigned, *made* or remade, and *intended* to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be *readily restored* to fire a fixed cartridge.

Again the underscored words suggest that a rifle meeting this definition must physically exist. In particular, the ordinary meaning of "restore" is to put back in a pre-existing condition. *Webster's Third New International Dictionary* 1936 (17th ed. 1976). One cannot restore rifle form, readily or otherwise, a separate pistol and carbine conversion kit that previously have not been combined.

The statutory definition of "make" also supports this interpretation. "The term 'make', and the various derivatives of such word, shall include manufacturing . . . , putting together, altering, any combination of these, or otherwise producing a firearm." 26 U.S.C. § 5845(i). The import is clear: a statutory firearm must exist in fact, not in contemplation, to be "made" within the meaning of the statute. *How* a firearm is "made" is irrelevant; that it exist is not. *Cf. United States v. Drasen*, 845 F.2d 731, 736-37

(7th Cir. 1988). Of course, the term "make" can be modified by "could" or similar language indicating that the potential or likely existence of a firearm is enough. But Congress did not use that language in defining "rifle".

Finally, section 5822 suggests that Congress expected individual persons, in some circumstances, to make firearms subject to the Act. It provides that no person shall make a firearm unless he has filed with the Secretary of the Treasury an application to make and register the firearm and has "identified himself in the application form in such manner as the Secretary may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph." 26 U.S.C. § 5822. In our view, this provision contemplates the individual owner of a Contender pistol and carbine conversion kit who actually makes a short-barreled rifle, no less than the owner of an otherwise legal and unregulated long rifle or shotgun who saws off the barrel. *See, e.g., United States v. Rose*, 695 F.2d 1356 (10th Cir. 1982).

Our reading of the Act is not a hypertechnical, excessively stingy construction that ignores or frustrates the statutory scheme. On the contrary, interpreting the definitions of "firearm" and "rifle" to encompass an unassembled collection of parts that *could* be made into a proscribed short-barreled rifle renders statutory language defining other types of "firearms" either awkward or superfluous. For example, Congress used the phrase "readily restored" in defining not only "rifle", but "machinegun", "shotgun", "any other firearm", and "unserviceable firearm" as well. *See* 26 U.S.C. § 5845(b), (d), (e), and (h). It deliberately did not use the phrase in the definition of "destructive device", choosing instead

to use the broader phrase "readily converted". *Id.* § 5845(f). We can find no principled difference between "restored", as interpreted by the government, and "converted", as commonly understood: to change from one (unregulated) form into another (regulated) form. *Webster's Third New International Dictionary* 499. Therefore, to adopt the government's construction of the term "rifle" requires us to read out of the statute either the word "converted" in section 5845(f) or the word "restored" in section 5845(b)-(e) and (h). We see no justification for this, especially when according the words their ordinary meanings makes the most sense of the statute.

More importantly, interpreting the definition of "rifle" to cover the unassembled combination of a Contender pistol and carbine conversion kit makes "combination of parts" language elsewhere in the statute superfluous. For example, section 5845(b) defines "machinegun" to include "any *combination of parts* from which a machinegun *can be assembled* if such parts are in the possession or under the control of a person." 26 U.S.C. § 5845(b) (emphasis added). Section 5845(f) similarly defines "destructive device" as "any *combination of parts* either designed or intended for use in converting any device into a destructive device . . . and from which a destructive device *may be readily assembled.*" *Id.* § 5845(f) (emphasis added). Finally, section 5845(a)(7) defines "firearm silencer" (by reference to section 921(a)(24) of the Gun Control Act of 1968, 18 U.S.C. §§ 921-930) to include "any *combination of parts*, designed or redesigned, and *intended for use in assembling* or fabricating a firearm silencer . . . ." 26 U.S.C. § 5845(a)(7); 18 U.S.C. § 921(a)(24) (emphasis added). We do not believe Con-

gress intended courts to supply by interpretation in section 5845(c) what it provided by express language in section 5845(a)(7), (b), and (f).

B. Legislative History

Only very clear evidence of contrary legislative intent can displace the plain meaning of a statute. *Aaron v. SEC*, 446 U.S. 680, 697 (1980); *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1559 (Fed. Cir. 1988). Nothing in the history of the National Firearms Act contravenes our reading.

As originally enacted in 1934, the National Firearms Act did not define "rifle". Act of June 26, 1934, 48 Stat. 1236. Though Congress subsequently amended relevant portions of the Act five times and added a definition of "rifle" which it twice specifically altered, it never added language purporting to reach unassembled short-barreled rifle parts. That it did add "combination of parts" language in the case of machineguns, destructive devices, and silencers strongly suggests that it does not intend the Act to cover unassembled pistol conversion kits of the type at issue here.

Congress added definitions of "rifle", "shotgun", and "any other weapon" to the Act in 1954. Internal Revenue Code of 1954, Pub. L. No. 83-591, 68A Stat. 3 (codified at 26 U.S.C. § 5848 (1954)). The original definition of "rifle" read:

> The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and *designed and made* to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

26 U.S.C. § 5848(3) (emphasis added). The accompanying House report explained that the definitions of "rifle", "shotgun", and "any other weapon" were added to *exclude* firearms like blunderbusses, muzzle-loading shotguns, and other ancient or antique guns from the Act's reach, "in pursuance of the clearly indicated congressional intent to cover under the National Firearms Act only such modern and lethal weapons . . . as could be readily and efficiently used by criminals and gangsters." H.R. Rep. No. 1337, 83d Cong., 2d Sess. 524, *reprinted in* 1954 U.S. Code Cong. & Admin. News 4019, 4542.

Congress amended the definition of "rifle" four years later by inserting the phrase "designed or redesigned and made or remade" in lieu of the underscored language. Excise Tax Technical Changes Act of 1958, Pub. L. No. 85-859, § 203(f), 72 Stat. 1275, 1427 (1958). The change was intended "to clarify the intent of this section and is in accordance with the administrative construction of existing law." S. Rep. No. 2090, 85th Cong., 2d Sess. 9, *reprinted in* 1958 U.S. Code Cong. & Admin. News 4395, 4603. Part of that administrative construction is a 1954 revenue ruling, later revoked, *see* Rev. Rul. 72-178, 1972-1 C.B. 423-24, that stated "the possession or control of sufficient parts to assemble an operative firearm constitutes the possession of a firearm, and the transfer of sufficient parts to assemble an operative firearm constitutes the transfer of a firearm . . . ." Rev. Rul. 54-606, 1954-2 C.B. 33. The government relies on the single sentence quoted above from the legislative history of the 1958 amendment and a similar statement in the legislative history of the 1968 amendments to the "rifle" definition, *see* S. Rep. No. 1501, 90th Cong., 2d Sess. 46 (1968), to estab-

lish that Congress intended to "adopt" the construction in Revenue Ruling 54-606.

The argument is untenable. Revenue Ruling 54-606 is a substantial and, in our view, unwarranted extension of the statute's plain meaning; we do not think Congress would adopt so sweeping an administrative "amendment" without explicitly mentioning it. *See Drasen*, 845 F.2d at 738-39 (Manion, J., dissenting); *United States v. Lauchli*, 371 F.2d 303, 312 (7th Cir. 1966) ("we need not go as far as the Internal Revenue Ruling [54-606]"). This is especially so when the manner in which Congress *did* amend the statute—replacing "designed and made" with "designed or redesigned and made or remade"—does not even vaguely reflect, let alone clearly implement, the administrative construction assertedly adopted.

Congress again failed to adopt that construction in 1968 when, in title II of the Gun Control Act of 1968, it generally revised the entire National Firearms Act.[3] Title II modified the definition of "firearm", "machinegun", "rifle", "shotgun", and "any other weapon" and added definitions of "destructive device" and "make". Gun Control Act of 1968, Pub. L. No. 90-618, title II, 82 Stat. 1213, 1227 (1968). The definition of "firearm" was expanded to include both a weapon made from a rifle that has a barrel less than 16 inches in length (regardless of the weapon's overall length) and a "destructive device". *See* 26 U.S.C. § 5845(a)(4), (8) (1982); S. Rep. 1501, 90th Cong., 2d Sess. 45 (1968) [hereinafter S. Rep. No. 1501]. The "rifle" definition was modified by deleting the limitation that cartridges fired be "metallic" and, more importantly, by adding the phrase "and shall include any such weapon which may be *readily restored* to fire a fixed cartridge." 26 U.S.C. § 5845(c) (1982). The Senate report explains: "the definition has been clarified to specifically include any such weapon which may be readily restored to fire a fixed cartridge. The . . . change is consistent with the administrative construction of existing law." S. Rep. No. 1501 at 46.

Congress simultaneously added "readily restored" language to the definitions of "machinegun", "shotgun", and "any other weapon", explaining in the context of "shotgun" that

> The clarification is consistent with the administrative construction of existing law. However, a district court held that a shotgun with a missing firing pin was not a firearm as defined in the National Firearms Act. This change is intended to make it completely clear that that court decision [*United States v. Thompson*, 202 F. Supp. 503 (N.D. Cal. 1962)] is not consistent with the intended coverage of this subsection.

[3] Congress also amended the Act in 1960, but it did not change the "rifle" definition. Instead, it altered the definition of "firearm" to include "a rifle having a barrel or barrels of less than 16 inches in length, or any weapon made from a rifle or shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches . . . ." Pub. L. No. 86-478, § 3, 74 Stat. 149 (1960). The purpose of the amendment was two-fold: to exclude from the definition of "firearm" a number of popular sporting rifles having a barrel length slightly under 18 inches (considered firearms under previous law), and to ease administration of the Act. S. Rep. No. 1303, 86th Cong., 2d Sess. 3, *reprinted in* 1960 U.S. Code Cong. & Admin. News 2111, 2113. The amendment is relevant as an example of Congress once again turning its attention to the type of rifles it wanted to regulate under the NFA and, once again, declining to cover combinations of rifle parts.

S. Rep. No. 1501 at 46. Therefore, it appears that by adding the "readily restored" language to the definitions of "machinegun", "rifle", "shotgun", and "any other weapon", Congress intended to preempt judicial decisions exempting weapons from the coverage of the Act solely because they lacked firing pins.[4] Rather than repeat this explanation for each of the sections affected, it summarily said the change was "consistent with" an unspecified administrative construction of existing law. Contrary to the government's argument, Congress did not say, and there is no evidence to suggest, that it intended to "adopt" any specific construction, in particular that given the statute in Revenue Ruling 54-606.

Indeed, the 1968 amendments to the "machinegun" definition and the addition of a "destructive device" definition both illustrate that, "where Congress intended to regulate combinations of parts, it did so precisely and explicitly." *Drasen*, 845 F.2d at 738

[4] The government cites *United States v. Woods*, 560 F.2d 660 (5th Cir. 1977), for the proposition that the "readily restored" language of section 5845(d) encompasses an unassembled sawed-off shotgun. *Woods* addresses whether probable cause existed to believe that what looked like a sawed-off shotgun barrel was contraband, thus justifying the subsequent search for the gun's stock and the seizure of both barrel and stock. Therefore, the court's discussion of whether the two unassembled pieces in fact comprised a firearm within the meaning of section 5845(d) is dictum. Moreover, we could agree with the *Woods* dictum but still hold for Thompson. Though the shotgun was in two pieces when found, the court apparently assumed the gun previously had been assembled. *See* 560 F.2d at 664. Finally, in contrast to the Contender pistol and carbine conversion kit, the two pieces could *only* be assembled as a short-barreled shotgun regulated by the Act. *Id.*

(Manion, J., dissenting). The amended definition of "machinegun"

> provides three new categories as included within the term "machinegun": (1) the frame or receiver of a machinegun, (2) *any combination of parts* designed and intended for use in converting a weapon other than a machinegun into a machinegun; *for example, so-called conversion kits*, and (3) *any combination of parts* from which a machinegun can be assembled if such parts are in the possession of a person.

S. Rep. No. 1501 at 45-46 (emphasis added). It is not by accident or oversight that Congress amended the definition of "machinegun" but not "rifle" to include unassembled parts, particularly conversion kits.[5] Though it is unclear whether competitors of Thompson manufactured conversion kits for the Contender pistol prior to 1968—according to the uncontroverted affidavit of Thompson's president Robert L. Gustafson, the Contender pistol has been manufactured continuously since 1967 and conversion kits have been marketed since the late 1960s—thousands

[5] *United States v. Kokin*, 365 F.2d 595 (3d Cir. 1966), and *United States v. Lauchli*, 371 F.2d 303 (7th Cir. 1966), decided prior to the 1968 amendments, do not establish the proposition for which the government cites them—"that the transfer of parts from which operative machine guns could be assembled constituted the transfer of machine guns under the Act"—and do not otherwise support its argument. In both cases, the defendant actually assembled some of the parts as complete machine guns, and the parts could *only* be assembled as firearms within the meaning of the Act. *See* 371 F.2d at 313. Moreover, in *Lauchli* at least, the transferees demanded complete and operable machineguns and the defendant gave them a booklet explaining how to so assemble them.

of the kits existed when, in 1986, Congress again amended the Act and again declined to add combination of parts language to the definition of "rifle". *See* Firearms Owners' Protection Act, Pub. L. No. 99-308, § 109, 100 Stat. 449, 460 (1986).

Finally, what is true of the amended definition of "machinegun" is true of the added definition of "destructive device". The term includes "*any combination of parts* either designed or intended for use in converting any device into a destructive device . . . and from which a destructive device may be readily assembled." 26 U.S.C. § 5845(f) (1982). That Congress deliberately included "combination of parts" language in the definition of "destructive device" strongly suggests that it did not inadvertently omit similar language in the definition of "rifle".

As mentioned above, Congress last amended the National Firearms Act in 1986. Again the amendments demonstrate that when Congress intends to regulate unassembled parts, it does so explicitly. Section 109 of the Firearms Owners' Protection Act amended the definition of "firearm" in section 5845(a) to include "(7) any silencer (as defined in section 921 of title 18, United States Code)." 100 Stat. at 460. Section 101 of the same act adds to section 921 of title 18 the following definition:

> (24) The terms "firearm silencer" and "firearm muffler" mean any device for silencing, muffling, or diminishing the report of a portable firearm, *including any combination of parts*, designed or redesigned and intended for use in assembling or fabricating a firearm silencer or firearm muffler, *and any part* intended only for use in such assembly or fabrication.

100 Stat. at 451; *see* 18 U.S.C. § 921(a)(24).[6] Congress reiterated in the preamble to the act what it had first stated in section 101 of the Gun Control Act of 1968: "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting . . . target shooting . . . or any other lawful activity . . . ." 100 Stat. at 449. This admonition, were it even necessary, requires us to decline the government's invitation to expand the definition of "rifle" to encompass the Contender pistol and carbine conversion kit. The government admits that both pistol and carbine are intended and primarily used for the legitimate purposes of hunting and target shooting. Thus, even if we adopted the policy-driven mode of analysis used in *United States v. Endicott*, 803 F.2d 506 (9th Cir. 1986), and *United States v. Luce*, 726 F.2d 47 (1st Cir. 1984), cases holding that the pre-1986 version of section 5845(a)(1) included component parts of a silencer, we would reach the same conclusion. Unlike a silencer, the Contender pistol and carbine are admittedly not " 'ganster-type' devices". *Luce*, 726 F.2d at 49.

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[6] A companion law to the Firearms Owners' Protection Act amended the definition of "ammunition" in § 921(a)(17) of the Gun Control Act by adding a new subsection defining "armor piercing ammunition". *See* Pub. L. No. 99-408, § 1, 100 Stat. 920 (1986). Section 10 of that law provides, "For purposes of section 921(a)(17)(B) of title 18 . . . 'handgun' means any firearm including a pistol or revolver designed to be fired by the use of a single hand. The term also includes *any combination of parts* from which a handgun can be assembled." 100 Stat. at 922; *see* 18 U.S.C. § 921 note.

C. Cases Construing "Rifle"

With one exception, other cases construing the word "rifle" are consistent with our interpretation. For example, *United States v. Combs*, 762 F.2d 1343 (9th Cir. 1985), affirmed Combs's conviction for possessing an unregistered firearm in violation of sections 5841 and 5861(d) of the Act. In response to Combs's argument that he did not "make" a firearm which section 5841 would require him to register, the court observed,

> [t]he government offered expert testimony that when Combs replaced the Uzi's 16-inch barrel with a 9¼-inch barrel he altered the Uzi from a legal rifle to an illegal concealable pistol. . . . The evidence at trial indicated that the barrel originally attached to the rifle was detached and the shortened barrel installed in its place. Combs was found in possession of the Uzi with the shortened barrel, and the barrel of legal length with which the Uzi is sold in the United States was found in the back of his truck along with the case for the Uzi. From the evidence presented at trial, there was sufficient evidence for the jury to conclude that Combs bought the shorter barrel and installed it. *Thus the Uzi was altered by Combs and therefore was "made" within the terms of the statute.*

762 F.2d at 1347. Like the Contender pistol and carbine conversion kit, the Uzi submachinegun and separate 9¼-inch barrel can be assembled as either a legal carbine or a proscribed short-barreled 90-5091 rifle. Moreover, like the Contender, the Uzi is sold with an imprinted warning (also appearing in the instruction manual) that replacing the 16-inch barrel with a shorter barrel creates an illegal weapon. *Id.* We think *Combs* correctly held that a short-barreled rifle is "made", i.e., that a firearm within the meaning of section 5845(a)(3) or (4) exists, when its component parts are actually assembled as such. *See also United States v. Rose*, 695 F.2d 1356 (10th Cir. 1982) (Uzi submachine guns with barrels sawed off to a length less than 16 inches are rifles as defined in the National Firearms Act; sawing off the barrels constitutes "making" an illegal firearm).

Only *United States v. Drasen*, 845 F.2d 731 (7th Cir. 1988), is arguably inconsistent. That case held that complete but unassembled short-barrel rifle parts kits were "rifles" within the meaning of section 5845(c). Like the other cases on which the government relies—*Woods*, *Lauchli*, *Kokin*, *Endicott*, and *Luce*—*Drasen* involved unassembled parts that could *only* be assembled as illegal firearms. This distinction, if not dispositive, is important. *Drasen* is also inconsistent with an earlier Seventh Circuit case, *United States v. Zeidman*, 444 F.2d 1051 (1971), in which the court upheld Zeidman's conviction for possessing an illegal short-barreled rifle which, though in two pieces when seized, previously had been assembled in the presence of Zeidman by an undercover government investigator. The court observed "*Once the two parts are attached in rifle form*, it becomes clear that the single unit fits the definition of a short barreled rifle." *Id.* at 1053 (emphasis added). To the extent, if any, that *Drasen* is inconsistent with our decision here, we decline to follow it.

Conclusion

Accordingly, the judgment of the Claims Court is reversed.

REVERSED

APPENDIX B

IN THE UNITED STATES CLAIMS COURT

No. 652-88T

(Filed March 23, 1990)

THOMPSON/CENTER ARMS COMPANY,
A DIVISION OF THE K.W. THOMPSON
TOOL COMPANY, INC., PLAINTIFF
v.
THE UNITED STATES, DEFENDANT

Taxes; excise tax; National Firearms Act, 26 U.S.C. § 5845(a); definitions of firearm" and "rifle"; possession of pistol and Carbine Kit constitute possession of a "firearm."

OPINION

MARGOLIS, *Judge*.

Plaintiff, a firearms manufacturer, claims a $200 tax refund, alleging that the tax was erroneously collected. The special excise tax at issue in this case is levied on the "making" of items statutorily defined as "firearms" under the National Firearms Act (NFA or Act). 26 U.S.C. § 5801 *et seq.*, § 5821. The parties disagree as to whether two of the plaintiff's products—the Contender pistol, possessed in conjunction with the Contender Carbine Kit—together comprise a "firearm" under 26 U.S.C. § 5845(a), which is thus taxable under the NFA. This case is before the court on cross motions for summary judgment. After hearing oral argument and after review of the entire record, this court grants the defendant's motion for summary judgment and denies the plaintiff's motion for summary judgment.

FACTS

Thompson/Center Arms Co., a division of the K.W. Thompson Tool Company, Inc. (TCA), a sporting arms manufacturer, manufactures the Contender pistol, a single shot pistol with a ten-inch barrel and overall length of fourteen inches. The pistol barrel is interchangeable with other barrels made by TCA. The Contender Carbine Kit (Kit), manufactured briefly by TCA in 1985, consists of a tweny-one inch barrel, a shoulder stock and a forend. These parts can be attached to the receiver of the Contender pistol to produce a single shot rifle.[1] The manufacturer's shoulder stock, packing, instructions and advertising included a warning that the use of the shoulder stock with a barrel less than sixteen inches in length would violate federal law. The warning was also embossed on the recoil pad of the shoulder stock.

The pistol is converted into a carbine by exchanging the ten-inch barrel for the twenty-one-inch barrel, and replacing the pistol grip with the shoulder

---

[1] The receiver of the pistol, also called the pistol action or frame, is a metal component containing the trigger and hammer to which the barrel and either the pistol grip or the shoulder stock can be attached. The shoulder stock is a wooden support which attaches to the receiver to allow the gun to rest against the shoulder during firing. The forend, a small wooden piece, attaches under and supports the barrel.

stock. All of the necessary parts are contained in the conversion kit. The only tools required are an Allen hex wrench, screwdrivers and a hammer. Although plaintiff asserts that the pistol is not intended to be converted into a short barrel rifle, the parts are completely interchangeable. There is nothing to prevent the consumer from replacing the pistol grip with the shoulder stock, without also substituting the rifle barrel for the pistol barrel. At the request of the court, counsel for the plaintiff did exactly that, creating what all parties concede was a short barrel rifle, a firearm under the NFA.

In 1971, R. Gustafson, president of TCA, wrote to the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service (ATF), requesting an informal opinion on the legality of using the Contender pistol receiver to make a single shot carbine with a barrel eighteen inches long and a full shoulder stock. The reply from Rex Davis, then Acting Director of ATF, stated that "the manufacture of a carbine . . . by utilizing a pistol action, would be legal and the firearm so produced would not come within the purview of the NFA." He also made these recommendations:

> [i]n view of the interchangeable barrel capabilities of your Contender action, we believe that it would be in the public interest for you to include a cautionary statement with each firearm. This statement would serve to advise the purchaser that any reduction of the barrel length of the carbine to less than 16 inches, whether by substitution of the carbine barrel with one of your pistol barrels or otherwise, . . . would constitute the making of a firearm within the purview of

> Section 5845(a) of the National Firearms Act . . . . To preclude the ready conversion of the carbine to a short barreled rifle through the substitution of one of your pistol barrels, you might find it advisable to vary the receivers used in the carbines in such a way so as to render them incapable of accepting your pistol barrels. We also recommend that the receivers used in the carbines be marked in some way to distinguish them from the receivers used in your pistol.

In 1985, TCA briefly produced the Contender Carbine Kit, including a warning such as the one suggested by Davis. Production was halted when TCA was advised by Stephen Higgins, Director of the Bureau of Alcohol, Tobacco and Firearms (BATF), that the Carbine Kit, possessed in conjunction with the Contender pistol, would constitute a firearm subject to the NFA. Higgins also informed TCA that the possession of a complete pistol and complete carbine would *not* be within the scope of the NFA unless the components were actually assembled as a short barrel rifle.

TCA filed suit in U.S. District Court seeking a declaratory judgment that the Contender pistol and the Contender Carbine Kit did not comprise of "firearm." The court held that it lacked subject matter jurisdiction over the case. *Thompson/Center Arms Co. v. Baker*, 686 F. Supp. 38, 44 (D.N.H. 1988). In order for the court to have subject matter jurisdiction, TCA was required to first pay the NFA tax and then sue for a refund. *Id.*

In October 1987, plaintiff submitted an Application to Make and Register a Firearm and paid the $200 tax. The application was approved by BATF in

December 1987. TCA then filed a claim for a refund of the tax payment in March 1988, claiming that no short barrel rifle was ever made, but rather that TCA had segregated and possessed as a unit the Contender pistol and the Contender Carbine Kit. TCA claims that because the component parts were never actually assembled as a short barrel rifle, no "firearm" was ever "made." TCA was never notified of the disallowance of the claim, and after more than six months had elapsed, filed this suit.

Plaintiff claims that the Contender pistol and Carbine Kit possessed as a unit and used together do not constitute a firearm under 26 U.S.C. § 5845(a)(3). Plaintiff therefore asserts that the $200 special excise tax levied on "firearms" was erroneously collected and requests a refund of that tax payment. In its complaint, plaintiff also sought declaratory judgment that the Contender pistol and Carbine Kit when possessed together as a unit did not constitute a short barrel rifle unless actually assembled as such. However, in its opposition to defendant's motion for summary judgment, plaintiff concedes that the declaratory judgment issue is moot, as a judgment on the tax refund claim would provide plaintiff with complete relief. Also, counts two and three of the complaint are not issues in this case.

The government claims that, according to both the statute and relevant case law, the pistol and the Carbine Kit, sold or held as a unit, do constitute a short barrel rifle under 26 U.S.C. § 5845(a)(3), because together they include all of the component parts of a short barrel rifle. The government contends that even though the kit *also* allows the purchaser to make a long barrel rifle (*not* a firearm under the NFA), the pistol plus the kit still constitute a firearm under

the NFA. Therefore, the government concludes that the excise tax was properly collected.

DISCUSSION

This case requires the court to interpret the NFA to determine whether the Contender pistol, possessed in conjunction with the Contender Carbine Kit, meets the statutory defintion of a "firearm" under 26 U.S.C. § 5845. The first step in construing a statute is to look to the language of the statute itself. *Greyhound Corporation v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978) (citations omitted). Of particular importance are the definitions expressed within the statutes. *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1560, *cert. denied*, 109 S. Ct. 1342 (1989). Section 5845 of the Internal Revenue Code, the definitions section of the NFA (as amended by the Firearms Owners' Protection Act of 1986, P.L. 99-308, ¶ 109), reads in pertinent part as follows:

> (a) Firearm.—
>
> The term "firearm" means
>
> * * *
>
> (3) a rifle having a barrel or barrels of less than 16 inches in length;
>
> * * *
>
> (c) Rifle.—
>
> The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any

such weapon which may be readily restored to fire a fixed cartridge.

• • •

(i) Make.—

The term "make," and the various derivatives of such word, shall include manufacturing (other than by one qualified to engage in such business under this chapter), putting together, altering, any combination of these, or otherwise producing a firearm.

Plaintiff contends that the Contender pistol, possessed in conjunction with the Contender Carbine Kit, does not comprise a firearm because the two products are not, and have never been, assembled as a short barrel rifle. Plaintiff relies on the definition of the term "make" in arguing that the statute requires that the firearm be put together. This overly narrow reading of the statute is not supported by the wording of the statute, the legislative history or the applicable revenue rulings.

The statute does not specifically refer to "assembled" rifles, "unassembled" rifles or combination of parts from which rifles can be made. However, it is clear that Congress intended to include a broad range of combinations within the definition, otherwise more restrictive language would have been used. The phrase "or otherwise producing a firearm" is clearly indicative of Congressional intent to include the broadest array of combinations. Proper construction of the statute must be consistent with the obvious intent of Congress. Therefore, this court holds that the definition of the term "make" addresses not only assembled rifles, but also unassembled rifles and com-

plete parts kits from which rifles can be made. This interpretation is amply supported by the legislative history and the revenue rulings.

Legislative History of the National Firearms Act

A careful examination of the legislative history of the 1968 amendments to the National Firearms Act reveals that Congress intended to broaden the scope of the definition of "firearms," to bring more types of weapons within the ambit of the Act. H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 4426, 4434. Plaintiff, however, argues that the amendments expanding coverage as to other weapons actually narrowed the definition of rifles subject to the Act. This court believes that the plaintiff misreads the legislative history.

In 1968, Congress added the following language to the definition of rifle: "and shall include any such weapon which may be readily restored to fire a fixed cartridge." The new language does not limit the definition of "rifle" to those rifles which had already been assembled at some time in the past. On the contrary, the change expanded the coverage of the Act. Application of the basic rules of grammar shows that Congress, in using the conjunctive "and," mean to expand its definition of what constituted a rifle. Congress closed a loophole which would allow one to try to avoid the application of the Act by simply disassembling a single part of the firearm. It is equally illogical to argue that Congress intended to include as a firearm only weapons which had been *pre*-assembled. *See United States v. Drasen*, 845 F.2d 731, 736 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 262. If that were the case, persons could avoid payment of

the excise tax by selling firearms partially unassembled. Such an interpretation would subvert the intent of Congress in drafting the amendments to the Act.

It is also not the case, as plaintiff claims, that the expansion of the definitions of machineguns and silencers to include individual parts of those items somehow served to narrow the definition of rifle. It is true that the individual parts of rifles (*e.g.*, the barrel, the receiver, the shoulder stock) are not, in and of themselves firearms, because those parts can be and are used to make guns which are not firearms under the Act. In contrast, machinegun parts are used only to make firearms.

However, the government is not relying on a theory that the individual parts of the Contender pistol and the Contender Carbine Kit are each firearms under the NFA, *i.e.*, the government does not argue that the shoulder stock is itself a firearm. Rather, the government argues that the pistol and the kit *when possessed together* comprise all the requisite parts of a firearm, and therefore are the equivalent of an unassembled short barrel rifle.

The "Administrative Record"

Plaintiff has provided the court with informal opinion letters from the ATF and its successor agency, BATF. Some of those letters were addressed to TCA, and some were addressed to other companies seeking informal opinions. Plaintiff refers to these letters collectively as "the administrative record." That is somewhat of a misnomer, as those letters do not constitute the "record" of the instant case, which is a *de novo* proceeding for a tax refund, but rather describe the position of the agency in response to particular factual queries. Such letters are non-binding agency opinions. Where there is a conflict between unpublished letter opinions, and the statute and the revenue rulings interpreting that statute, the latter two control, and the letters are entitled to no weight.

Nonetheless, this court agrees with the government that each of the letter opinions is either consistent with the interpretation now urged by the government, or is sufficiently distinguishable on its facts. For example, the 1971 letter from ATF Acting Director Rex Davis to TCA which states that the use of the Contender pistol action in "making up" a carbine would not be a violation of the NFA, nowhere addressed the issue of a single pistol plus a conversion kit. Rather, the response clearly anticipated the manufacture of a complete Contender carbine using a receiver identical to the one used in making a Contender pistol. Further, that letter anticipated the problem of having weapons whose barrels are fully interchangeable and therefore capable of being assembled as an NFA firearm. That is why Davis included the recommendations set forth in his letter *supra*.

The other letters cited by plaintiff concerned two complete weapons, combinations involving curios or relics, or were otherwise factually distinguishable from the present case. Defendant agrees that the 1973 letter from ATF to another company regarding the manufacture of a "sportsmen's kit" appears to be inconsistent with the agency's current position, but notes that, to the extent a non-binding letter opinion is inconsistent with agency policy, it is "just incorrect." This court agrees with that statement, and finds nothing else in the letter opinions to support plaintiff's position.

Revenue Rulings

Unlike opinion letters, published revenue rulings are given weight, as they represent the agency's official interpretation of the statute. Those rulings show that the agency has consistently held that the possession of a pistol with an attached or attachable shoulder stock constitutes possession of a firearm within the scope of the NFA. *See* Rev. Rul. 61-45, 1961-1, C.B. 663; Rev. Rul. 61-203, 1961-2, C.B. 224. Similarly, Rev. Rul. 54-606, 1954-2, C.B. 33, held that possession of sufficient parts to assemble a firearm constitutes possession of a firearm.[2]

The rulings which plaintiff argues are inconsistent with the government's current position (Rev. Rul. 59-340, 1959-2, C.B. 375, and Rev. Rul. 59-341, 1959-2, C.B. 376) differ in significant factual ways from the present case. Neither involved a situtation in which it was even possible to combine the component parts to make a short barrel rifle. Thus, this court find that the published agency opinions interpreting the NFA are consistent with the government's position that the Contender pistol possessed in conjunction with the Contender Carbine Kit constitute a firearm under the Act.

Cases Interpreting the Statute

Various courts of appeals have held that unassembled rifles and shotguns are firearms within the § 5845 definition. In 1971, the Seventh Circuit held

[2] These revenue rulings represent the agency's interpretation of the statute prior to its amendment by the Gun Control Act of 1968. In enacting the Gun Control Act, the Congress specifically adopted previous agency interpretations in reenacting the definitions section of the statute. *See United States v. Drasen*, 845 F.2d at 736.

that an unassembled pistol and holster-shoulder stock were a short barrel rifle because, when assembled, the parts would become a short barrel rifle. *United States v. Zeidman*, 444 F.2d 1051, 1053 (7th Cir. 1971). In *United States v. Woods*, the Fifth Circuit held that an unassembled sawed-off shotgun came within the definition of a firearm, because only minimal effort was required to make it functional. 560 F.2d 660, 664-65 (5th Cir. 1977), *cert. denied*, 435 U.S. 906 (1978).

As shown by the plaintiff's own submissions and its demonstration during oral argument, the process of dismantling the Contender pistol and reassembling a Contender carbine takes less than ten minutes, and can be accomplished with simple, readily available tools. Because the barrels are fully interchangeable, a short barrel rifle could be assembled in less than five minutes—even more easily and readily than a long barrel rifle—since the barrels would not have to be changed.

The case most closely analogous to our case is *United States v. Drasen*, 845 F.2d 731. In that case, the defendant sold complete short barrel rifle parts kits. None of the kits was assembled. The court held that the *un*assembled kit is no different than a *dis*assembled rifle, because the parts could be easily assembled into a rifle. *Id.* at 736. Further, the parts of the disassembled rifle and the unassembled rifle were identical and interchangeable. Again, the court did not hold that the individual parts of the rifle were firearms; rather the parts, aggregated together as a *kit*, were the equivalent of a firearm under the NFA. In the present case, Thompson/Center Arms segregated and possessed together all of the component parts of a short barrel rifle, which were capable of

being easily and readily assembled into a short barrel rifle. The presence of the additional, interchangeable rifle barrel is of no consequence; the rifle barrel is simply an extra piece. The court concludes that TCA possessed an unassembled short barrel rifle—a firearm under the Act and under the cases construing the Act.

Intent of the User

Plaintiff argues that there would be no reason for either a sportsman or a criminal to use the Contender Carbine Kit to create a short barrel rifle because, among other things, the resulting weapon would not be accurate, would be inconcealable, and would be slow to reload. However, defendant asserts that the NFA definition of a short barrel rifle includes no intent requirement. If a rifle has a barrel less than sixteen inches long, and is not otherwise excepted (*e.g.*, relics and curios), it is a short barrel rifle. One who makes a short barrel rifle is subject to the special excise tax. That is all. This court need not and will not attempt to delve into the minds of hypothetical gun owners to speculate as to what might motivate them to use the pistol plus the kit to fashion a short barrel rifle. The court need not consider what TCA intended when it sought to market the pistol inconjunction with the carbine kit. The fact that TCA may not have intended that the two products be assembled as a short barrel rifle does not alter the fact that the pistol and the kit together comprise all of the requisite parts of such a weapon.

Ambiguity of the Statute

Finally, plaintiff cites *Auto-Ordnance Corp. v. United States* for the proposition that, in a tax refund case, where there is a doubt as to the meaning

of a revenue statute, the doubt should be resolved in favor of the taxpayer. 822 F.2d 1566, 1571 (Fed. Cir. 1987). Plaintiff correctly points out an important and longstanding canon of tax jurisprudence. However, as discussed above, the pertinent language of the NFA is not ambiguous as applied to the facts of this case. The making of a rifle having a barrel of less than sixteen inches, not otherwise exempted, is subject to the imposition of the excise tax. Thus, the holding of *Auto-Ordnance* has no application to the present case.

In reviewing this case, the court has used every tool in its arsenal of legal analysis—rules of statutory construction, examination of pertinent legislative history, review of agency interpretation of the statute, examination of relevant case law, and the application of ordinary common sense. Each of these leads inexorably to conclusion that the Contender pistol in conjunction with the Contender Carbine Kit is a firearm under the National Firearms Act.

CONCLUSION

Summary judgment is appropriate where, as here, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. RUSCC 56(c). Here, the only dispute between TCA and the government is the interpretation of the NFA, which is a matter of law for the court to decide.

For the reasons set forth above, this court concludes that the Contender pistol possessed in conjunction with the Contender Carbine Kit is a short barrel rifle and a firearm under the National Firearms Act. Therefore, the excise tax was properly assessed, and no refund is due to the plaintiff. Accordingly, the

defendant's motion for summary judgment is granted, and the plaintiff's motion for summary judgment is denied. The Clerk will dismiss the complaint. Each party will bear its own costs.

/s/ Lawrence S. Margolis
LAWRENCE S. MARGOLIS
Judge, U.S. Claims Court

March 23, 1990

APPENDIX C

ORDER

Before RICH, Circuit Judge, MAYER, Circuit Judge, MICHEL, Circuit Judge.

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on April 5, 1991.

FOR THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated: March 29, 1991

cc: STEPHEN P. HALBROOK
GARY R. ALLEN

THOMPSON CENTER ARMS Co v US, 90-5091
(CLM-652-88 T)

APPENDIX D

ORDER

A suggestion for rehearing in banc having been filed in this case, and a response thereto having been invited by the court and filed,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, declined.

FOR THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated: May 13, 1991

cc: STEPHEN P. HALBROOK
GARY R. ALLEN

THOMPSON CENTER ARMS CO v US, 90-5091
(CLM-652-88 T)

APPENDIX E

The National Firearms Act, as amended, provides in relevant part:

1. Section 5821 [26 U.S.C. 5821]:

(a) *Rate.*—There shall be levied, collected, and paid upon the making of a firearm a tax at the rate of $200 for each firearm made.

(b) *By Whom Paid*—The tax imposed by subsection (a) of this section shall be paid by the person making the firearm.

* * * * *

2. Section 5841 [26 U.S.C. 5841]:

(a) *Central Registry*—The Secretary shall maintain a central registry of all firearms in the United States * * *.

(b) *By Whom Registered*—Each manufacturer, importer and maker shall register each firearm he manufactures, imports or makes. Each firearm transferred shall be registered by the transferor.

3. Section 5845 [26 U.S.C. 5845]:

(a) *Firearm*—The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other

weapon, as defined in subsection (e); (6) a machinegun; (7) a muffler or a silencer for any firearm whether or not such firearm is included within this definition; and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

* * * * *

(c) *Rifle*—The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

(i) *Make*—The term "make", and the various derivatives of such word, shall include manufacturing (other than by one qualified to engage in such business under this chapter), putting together, altering, any combination of these, or otherwise producing a firearm.

4. Section 5861 [26 U.S.C. 5861]:

It shall be unlawful for any person—

(c) to receive or possess a firearm made in violation of the provisions of this chaper; or

(d) to receive or possess a firearm which is not registered to him * * * ; or

(e) to transfer a firearm in violation of the provisions of this chapter; or

(f) to make a firearm in violation of the provisions of this chapter;

* * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20635

No. 91-164

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner

v.

THOMPSON/CENTER ARMS COMPANY, a Division of the K.W. THOMPSON TOOL COMPANY, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Contender single-shot pistol and carbine kit, which are intended to be made only as a pistol with a 10″ barrel and as a rifle with a 21″ barrel, nonetheless constitute a rifle having a barrel of less than 16″ in length under the Internal Revenue Code, § 5845(a)(3), even though not made as such and even though the United States concedes that use of two receivers would remove these parts from such taxation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
ARGUMENT	8
I. THE DEFINITIONS OF "RIFLE" AND OTHER RELEVANT TERMS PRECLUDE CLASSIFICATION OF THE CONTENDER PISTOL AND CARBINE KIT AS AN NFA FIREARM	8
A. The Narrow Definition of "Rifle" Contrasted with Broader NFA Definitions	8
B. When Congress Intended to Define a Type of Rifle as Including a Combination of Parts, It Did So, and Then Only If Intent is Present	10
C. The Firearms Owner's Protection Act of 1986 and the Crime Control Act of 1990	12
D. The Government Would Expand The Definition to Include A Product Capable Of Being Made Into A Taxable Rifle	13
II. THE DEFINITIONS AT ISSUE MUST BE CONSTRUED IN FAVOR OF THE TAXPAYER	19
III. THE CIRCUITS ARE NOT IN CONFLICT	21
A. No Other Reported Cases Concern a Pistol and Carbine Kit	21
B. While Flawed, *Drasen* Does Not Apply to the Products at Issue	24
C. At the Government's Urging, *Drasen* Was Based on a Revenue Ruling Which Was Revoked in 1972	27
CONCLUSION	30

TABLE OF AUTHORITIES

CASES

	Page
Alinco Life Ins. Co. v. *United States*, 178 Ct. Cl. 813, 373 F.2d 336 (1967)	21
Commissioner v. *Acker*, 361 U.S. 87 (1959)	20
Commissioner v. *Engle*, 464 U.S. 206 (1984)	20
Gould v. *Gould*, 245 U.S. 151 (1917)	19
Hanover Bank v. *Commissioner*, 369 U.S. 672 (1962)	21
Haynes v. *United States*, 390 U.S. 85 (1968)	7, 17, 19
Hoffman Estates v. *Flipside*, 455 U.S. 489 (1982)	12
Martin v. *Harrington & Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984)	27
Russello v. *United States*, 464 U.S. 16 (1983)	20
Sonzinsky v. *United States*, 300 U.S. 506 (1937)	7, 19
Thompson/Center Arms Co. v. *Baker*, 686 F. Supp. 38 (D.N.H. 1988)	19
United States v. *Anderson*, 885 F.2d 1248 (5th Cir. 1989)	18
United States v. *Bass*, 404 U.S. 336 (1971)	20
United States v. *Biswell*, 406 U.S. 311 (1972)	17
United States v. *Bradley*, 892 F.2d 634 (7th Cir. 1990)	25
United States v. *Catanzaro*, 368 F. Supp. 450 (D. Conn. 1973)	23
United States v. *Combs*, 762 F.2d 1343 (9th Cir. 1985)	23
United States v. *Cosey*, 244 F. Supp. 100 (E.D. La. 1965)	16
United States v. *Drasen*, 665 F. Supp. 598 (N.D. Ill. 1987), *rev'd* 845 F.2d 731 (7th Cir. 1988), *cert. denied*, 488 U.S. 909 (1988)	24-30
United States v. *Endicott*, 803 F.2d 506 (9th Cir. 1986)	22
United States v. *Freed*, 401 U.S. 601 (1971)	7, 18
United States v. *Kokin*, 365 F.2d 595 (3rd Cir. 1966)	22
United States v. *Lauchli*, 371 F.2d 303 (7th Cir. 1966)	21
United States v. *Luce*, 726 F.2d 47 (1st Cir. 1984)	22
United States v. *Miller*, 307 U.S. 174 (1939)	7

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Posnjak*, 457 F.2d 1110 (2nd Cir. 1972)	17
United States v. *Rose*, 695 F.2d 1356 (10th Cir. 1982), *cert. denied* 104 S.Ct. 123	7
United States v. *Seven Miscellaneous Firearms*, 503 F. Supp. 565 (D.D.C. 1980)	10
United States v. *Smith*, 477 F.2d 399 (8th Cir. 1973)	23
United States v. *Tankersley*, 492 F.2d 962 (7th Cir. 1974)	26
United States v. *Woods*, 560 F.2d 660 (5th Cir. 1977), *cert. denied* 435 U.S. 906 (1978)	22

CONSTITUTION, STATUTES AND REGULATIONS

U.S. Constitution, Second Amendment	7
18 U.S.C. § 921(a)	12, 16, 22
18 U.S.C. § 922(r)	13
18 U.S.C. § 925(d)(3)	7, 13
26 U.S.C. § 5821	14
26 U.S.C. § 5822	14
26 U.S.C. § 5845	*passim*
26 U.S.C. § 5845(a)	*passim*
26 U.S.C. § 5845(b)	6, 9, 25
26 U.S.C. § 5845(c)	*passim*
26 U.S.C. § 5845(d)	23
26 U.S.C. § 5845(e)	23
26 U.S.C. § 5845(f)	*passim*
26 U.S.C. § 5845(i)	9, 15
26 U.S.C. § 5871	14
Firearms Owner's Protection Act, §§ 101, 109, P.L. 99-308, 100 Stat. 451 (May 19, 1986)	12, 25
P.L. 99-408, § 10, 100 Stat. 920 (Aug. 28, 1986)	12
27 C.F.R. § 71.41(d)	29
27 C.F.R. § 178.11	8
27 C.F.R. § 179.11	29

OTHER AUTHORITIES

ATF Ruling 83-5, ATFB 1983-3, 35	10, 16
CONG. REC., S5362-63 (May 6, 1986)	25

TABLE OF AUTHORITIES—Continued

	Page
Rev. Rul. 54-606, 1954-2, C.B. 33	27-29
Rev. Rul. 72-178, 1972-1, C.B. 423	28-29
Wright & Rossi, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS (1986)	7

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

The Contender sporting pistol has been made by Thompson/Center Arms * since 1967. It has a 10″ barrel, is inconcealable, and is a single shot, requiring each cartridge to be loaded and unloaded by hand before another shot can be fired. Out of 400,000 Contender pistols manufactured, the company is unaware of a single person ever using a Contender in a crime. The pistol has taken top honors as the leading pistol for hunting and target competition. (App. 2a; Court of Appeals Appendix 56-57.)

* Respondent has no parent companies or subsidiaries.

The Thompson/Center carbine kit consists of a 21" barrel, a wooden foreend to hold the carbine while shooting, and a shoulder stock. Removal of the 10" pistol barrel, foreend, and hand grip allows use of the pistol frame or receiver (the part which holds internal parts and to which the barrel and stock attach) to be assembled with the carbine kit parts to make a carbine (a type of rifle). The following conspicuous warning is molded on the carbine shoulder stock: "WARNING. FEDERAL LAW PROHIBITS USE WITH BARREL LESS THAN 16 INCHES." More detailed warnings to avoid violation of the National Firearms Act ("NFA") are included in the kit instructions. App. 2a.

Sportsmen, who would provide the only market for the Contender pistol and carbine kit, have no incentive to make a rifle with a barrel less than 16". The sportsmen who would use this product are generally law-abiding, and also the 10" pistol barrel used with a shoulder stock would have no sporting utility.

Nor would criminals have any motive to make a rifle with a barrel under 16" from the Contender pistol and carbine kit. A Contender with a 10" barrel and a huge shoulder stock is even less concealable than a Contender pistol. No criminal demand for single shot firearms exists.[1]

A retired BATF expert examined a complete Contender pistol and a complete Contender carbine. It took him over 10 minutes to remove and assemble parts on these guns in such a way as to simulate the time it would take

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[1] Indeed, the Bureau of Alcohol, Tobacco, and Firearms ("BATF") has removed large numbers of semiautomatic pistols with instantly attachable shoulder stocks, and rifles with barrels less than 16", from the NFA. Almost all items on BATF's curio and relic list are short-barrel rifles removed from the NFA because they are "not likely to be used as a weapon." 26 U.S.C. Section 5845(a) (last sentence); Appeals Appendix 48-49.

to convert a pistol into a carbine using a carbine kit. (Appeals Appendix 48.)

Any rifle or shotgun barrel is capable of being readily made into a short-barrel NFA firearm with a hacksaw. A 21" Contender carbine barrel can be cut off in 25 seconds with a common hacksaw. (Appeals Appendix 103-104.) Moreover, a complete Contender pistol and a complete Contender carbine are capable of having parts exchanged to make an NFA firearm, but BATF concedes that these items do not constitute a short-barrel rifle.

In 1971, Rex D. Davis, the BATF Director, wrote to Thompson/Center as follows:

> You asked if it would be legal to utilize the receiver of the Contender pistol in making up a single shot carbine with a barrel 18 inches long and with a full shoulder stock.
>
> You are advised that the manufacture of a carbine such as you describe, by utilizing a pistol action, would be legal and the firearm so produced would not come within the purview of the National Firearms Act . . . .
>
> In view of the interchangeable barrel capabilities of your Contender action, we believe that it would be in the public interest for you to include a cautionary statement with each firearm. This statement would serve to advise the purchaser that any reduction of the barrel length of the carbine to less than 16 inches, whether by substitution of the carbine barrel with one of your pistol barrels or otherwise, or the reduction of the overall length of the weapon to less than 26 inches would constitute the making of a firearm within the purview of Section 5845(a) of the National Firearms Act. (Appeals Appendix 31-32.)

In 1973, BATF addressed the "Sportsman's Kit," consisting of a pistol with interchangeable 16" and 4" barrels and a shoulder stock. The BATF Assistant Director

determined that the items are not an NFA firearm, and recommended that the manufacturer provide warnings not to attach the shoulder stock to the gun when the 4″ barrel is installed. (Appeals Appendix 34.) Several more letter rulings over the years repeated that to be an NFA rifle, the shoulder stock must be attached. (*E.g.*, *id.* at 35-38, 60). The government does not mention these letter rulings. *See* Petition 3 n.3.

The above was disregarded by a subordinate employee who wrote a letter in 1985 claiming that the Contender pistol and carbine kit just introduced by Thompson/Center Arms was a short-barrel rifle under the NFA, even though not assembled as such. BATF happily administered the NFA in the years 1968-1985 without the sky falling, despite its view that pistols and carbine kits are not NFA firearms.

The purpose of the conversion kit is to make a rifle with a 21″ barrel, not, as the government states in its version of the Question Presented, to "allow the pistols readily to be converted into rifles with 10-inch barrels." [2] That is like saying that Thompson/Center manufactures rifles with 21″ barrels that "allow" the barrels readily to be sawed off, or that the company manufactures firearms that "allow" persons readily to murder other persons.

The government claims that a unit that includes a receiver, 10″ barrel, and shoulder stock "is literally a weapon 'designed . . . and intended to be fired from the shoulder' " with a barrel less than 16″. Petition 7. This is not the case if the unit includes a 21″ barrel with warnings and instructions not to assemble a rifle with a

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[2] Also in the Question Presented the government incorrectly asserts that Thompson/Center "manufactures" conversion kits. Kits were manufactured only for a brief period in 1985. Only one pistol and carbine kit were possessed as a unit in connection with the payment of the $200 tax and the claim for a refund.

barrel under 16″. No "weapon" exists unless it is assembled, because mere parts cannot be fired. The "design" of the manufacturer and the "intent" of the user is to make only a pistol with a 10″ barrel or a rifle with a 21″ barrel.

The government misrepresents the version of the facts set forth by the Court of Appeals. That court allegedly claimed that "the short-barrel Contender rifle" is unlike silencers because it is not a gangster device. Petition 14, claiming to cite App. 15a. Instead, the court found that the pistol and carbine kit with 21″ barrel is *not* a short-barrel rifle.

The government refers to "the distinction between 'good' and 'bad' short-barrel rifles that the court of appeals seeks to draw." Petition 14. To the contrary, the court found that the items at issue are not a short-barrel rifle at all.

The government also distorts the Court of Appeals' discussion of contrasting "combination-of-parts" definitions. The Court was concerned with the definitions of machinegun, destructive device, and silencer as including a complete combination of parts from which such weapons could be assembled (with various intent standards), and the lack of any such definition of rifle. App. 7a-8a. Yet the government misreads the court as being concerned with a combination of parts to *convert* a weapon into a rifle. Petition 10. The court did not remotely suggest, as does the government, that this case concerns whether a conversion kit alone is regulated by the NFA.[3] Petition 10-11.

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[3] Until now the parties and courts have been concerned only with the definitions of machinegun, destructive device, and silencer as including a combination of parts from which a complete weapon can be assembled. Only now is the government interjecting the irrelevant definition of machinegun as including "any part designed and intended solely and exclusively, or combination of parts designed and

In still another red herring, the government claims that the Court of Appeals concluded that a "firearm"—by implication, any NFA "firearm"—is not "made" until assembled. Petition 7. Yet the court acknowledged the varied definitions of "firearm" in the NFA, which defines machineguns and certain other weapons as being made when a complete combination of unassembled parts is possessed, but does not so define rifles. The court's opinion is not a serious threat to the enforcement of the NFA because it does *not* require "that a *firearm* be fully assembled." Petition 15. The court ruled that a rifle and carbine kit which will never be assembled as a short-barrel rifle, is not such a rifle. The opinion does not address other NFA "firearms" other than to acknowledge that some types (such as machinegun) need not be assembled. Accordingly, the government's whining about trafficking in dangerous "firearms" and circumvention of the NFA evaporates. Petition 15-16.

The government contradictorily assets that sporting or criminal use in defining a weapon is irrelevant, but that the court's opinion will allow weapons of mass destruction. Petition 14, 16. It raises the bogeyman word "Uzi," failing to note that normally that term refers to a machinegun and thus is subject to a combination of parts definitions.[4] Generally, a short-barrel rifle is less

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intended, for use in converting a weapon into a machinegun. . . ." 26 U.S.C. § 5845(b). Only the next phrase of that subsection is relevant here—"any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person."

Contrary to the government, destructive device is not defined to include a mere conversion kit. Petition 11 n.8. Rather, 26 U.S.C. § 5845(f)(3) requires that all the parts to assemble a complete destructive device must be present: "any combination of parts either designed or intended for use in converting any device into a destructive device . . . *and from which a destructive device may be readily assembled.*"

[4] A cosmetically-similar semiautomatic model Uzi is imported into the United States only because BATF found it to be particularly

likely to be used in crime than any other type of firearm, including a long barrel rifle.[5] BATF has removed numerous short-barrel rifles, including semiautomatics, from the NFA because they are not likely to be used as weapons.[6] Under these circumstances, the Court of Appeals opinion—that items that will never be made into a short-barrel rifle do not constitute a short-barrel rifle—will not cause the sky to fall.

The Court of Appeals' decision contains no general statements of constitutional or statutory jurisprudence. Instead, it merely applies the law to the obscure, specific factual situation of the Contender pistol and carbine kit. The government's claims that the decision "drastically" erodes the NFA and that this case has "exceptional administrative importance" ring hollow. Petition 6.

Since passage of the NFA in 1934, this Court has never granted certiorari in a case where the only claim is that a court misapplied a definition of a type of firearm to a specific set of facts. NFA issues of interest to the Court have included the constitutional power of Congress to pass the NFA as a revenue measure, the Second Amendment, registration and self-incrimination, and scienter.[7]

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suitable for sporting purposes. 18 U.S.C. § 925(d)(3); *United States* v. *Rose*, 695 F.2d 1356, 1357 (10th Cir. 1982), *cert. denied*, 104 S.Ct. 123. As in the case at bar, "the carton, the instructions, and the firearm itself contained warnings that modification of the firearm was unlawful." No one would suggest that the importer was responsible for the owner quickly and easily sawing off the barrel in that case.

[5] J. Wright and P. Rossi, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 94-95 (1986). Plaintiff's Claims Court Exhibits A58. The study was conducted under the auspices of the National Institute of Justice.

[6] *See* 26 U.S.C. § 5845(a) (last sentence).

[7] *Sonzinsky* v. *United States*, 300 U.S. 506 (1937); *United States* v. *Miller*, 307 U.S. 174 (1939); *Haynes* v. *United States*, 390 U.S. 85 (1968); *United States* v. *Freed*, 401 U.S. 601 (1971).

This case is of importance to Thompson/Center and to sportsmen who would be able to use Contender pistols and carbines without the need to purchase a separate receiver for each. However, the government has not shown that the Court of Appeals' decision warrants this Court's review.

ARGUMENT

I. THE DEFINITIONS OF "RIFLE" AND OTHER RELEVANT TERMS PRECLUDE CLASSIFICATION OF THE CONTENDER PISTOL AND CARBINE KIT AS AN NFA FIREARM

A. The Narrow Definition of "Rifle" Contrasted with Broader NFA Definitions

The Contender pistol and carbine kit is intended for use as a pistol with a 10″ barrel and a rifle with a 21″ barrel. Neither of these guns are "firearms" as technically defined in 26 U.S.C. Sec. 5845(a).

Mere capacity to convert a gun into an NFA firearm does not make the gun an NFA firearm. Otherwise, all long-barrel rifles would be short-barrel rifles, merely because the barrels can be quickly sawed off. Indeed, the government does *not* argue that a mere combination of parts which could be, but are not in fact and are not intended to be, made and assembled into an NFA firearm, constitute an NFA firearm. It agrees that a Contender pistol and a Contender carbine (each with its own separate receiver)[8] do not constitute NFA firearms.

As reenacted in 1968, the definition of "rifle" in the National Firearms Act, § 5845(c), is as follows: "The term 'rifle' means a weapon designed or redesigned, *made or remade*, and *intended* to be fired from the shoulder and designed or redesigned and made or remade to use

[8] The receiver is the housing to which the barrel, stock, and internal parts attach. See 27 C.F.R. § 178.11 ("firearm frame or receiver").

the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be *readily restored* to fire a fixed cartridge." The last definitional clause was added in 1968.

The 1968 amendments also included the following definition: "The term 'make' and the various derivatives of such word, shall include manufacturing . . ., *putting together*, altering, any combination of these, or otherwise producing a firearm." 26 U.S.C. § 5845(i).

Thus, "the term rifle means a weapon . . . *made or remade*" (§ 5845[c]), and "the term 'make' . . . shall include . . . *putting together*" (§ 5845[i]). The definition of "make" as "putting together" would have no meaning if a mere combination of parts which had never been put together as such constituted "a rifle having a barrel or barrels of less than 16 inches in length" as used in § 5845(a)(3).

By contrast, those firearms (i.e., machineguns and over .50 caliber rifles) which are defined in terms of combinations of the parts, are "made" even before being "put together."[9] These firearms are "made" when a combination of parts from which such firearms may be assembled are "manufactur[ed] . . . or otherwise produc[ed]" (§ 5845[i]), subject to, in the case of over .50 caliber rifles, the parts being designed or intended and readily capable of being assembled as such.

A Contender pistol and carbine kit fit neither of the two definitions of "rifle" having a barrel less than 16″.

[9] 26 U.S.C. § 5845(b) provides: "The term 'machinegun' means . . . *any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.*" § 5845(f) defines "destructive device" to include a non-sporting rifle with a bore over .50 inches (or caliber), and a combination of parts designed or intended to assemble such a rifle, if the parts can be "readily converted" into such a rifle.

Mere parts never assembled as such neither constitute a "weapon" that "shoots," nor are they "restorable" to something they have never been.[10]

In sum, the 1968 Act introduced several new precise and carefully distinguishable terms. The term "rifle" is restricted to a "weapon" which is "made or remade," terms which include "putting together," and also includes an item which can be "readily restored" to be a rifle, which assumes that the item is being returned to a previous condition. By contrast, "machinegun" was amended to include, *inter alia*, "a combination of parts from which a machinegun can be assembled." Obviously, Congress did not intend the latter definition to apply to "rifle."

B. When Congress Intended to Define a Type of Rifle as Including a Combination of Parts, It Did So, and Then Only If Intent is Present

In the Gun Control Act of 1968, Congress wrote or rewrote definitions for two kinds of rifles: short barrel rifles, and rifles with bores of more than one-half inch in diameter ("destructive devices"). Congress sharply contrasted the definitions of these two kinds of rifles.

Congress broadly defined a "destructive device" in § 5845(f) in part as follows:

> . . . (2) any type of weapon by whatever name known which will, or which may be *readily converted* to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun . . .; and (3) *any combination of parts either designed or intended* for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and *from which a destructive device may be readily assembled.* The term "destructive device" shall not include any . . . rifle which the owner intends to use solely for sporting purposes. (Emphasis added.)

[10] "The 'readily restorable' definition defines *weapons which previously could shoot* . . . but will not in their present condition." ATF Ruling 83-5, ATFB 1983-3, 35. "The term which Congress saw fit to use in the statute, 'restorable', is defined by Webster 'to bring back to a former or normal condition, as by repairing. . . .'" *United States* v. *Seven Miscellaneous Firearms*, 503 F. Supp. 565, 574 (D.D.C. 1980).

The above was intended to include large bore military rifles without sporting uses, and combinations of parts intended to be assembled as such. The NFA definitions of both "rifle" and "destructive device" include fully made (assembled) weapons. However, while a "rifle" (including a short-barrel rifle) includes "any such weapon which may be *readily restored* to fire a fixed cartridge," a rifle with a bore of more than one-half inch in diameter is a destructive device if it "may be *readily converted* to expel a projectile". The broader "readily converted" language does not require that a device have previously been a destructive device. As a practical matter, the "readily-convertible" definition could not apply to "rifle," since every rifle is readily convertible to a short-barrel rifle by use of a hacksaw.

Neither definition includes a mere combination of parts from which a short-barrel rifle or rifle with bore over one half inch can be assembled. Only the latter includes "any combination of parts either *designed or intended* for use in converting any device into a destructive device . . . *and* from which a destructive device may be readily assembled." § 5845(f)(3).

This demonstrates that Congress rejected a strict "combination of parts" definition for NFA firearms in general, requiring in the case of destructive devices the elements both of design or intent,[11] and capability of being readily

[11] While "intended" normally refers to the intent of the person in possession, "design" refers to the intent of the manufacturer and the predominant use of a product. A product merely capable of

assembled. Congress did not adopt an absolute liability standard for rifles to encompass a combination of parts which are expressly *not* intended to be assembled with a barrel less than 16″ in length.

C. The Firearms Owner's Protection Act of 1986 and the Crime Control Act of 1990

In the 1986 amendments enacted as the Firearms Owners' Protection Act, Congress revisited and had ample opportunity to expand the definition of particular firearms by addition of "combination of parts" language such as already existed for machineguns and destructive devices. It did enact similar language in reference to two types of firearms, but did not do so in reference to the term "rifle."

The term "silencer" was not defined before 1986. The Firearms Owners' Protection Act added the following: "The terms 'firearm silencer' and 'firearm muffler' mean any device for silencing, muffling, or diminishing the report of a portable firearm, *including any combination of parts*, designed or redesigned, and *intended for use in assembling or fabricating* a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication." 26 U.S.C. § 5845(a)(7), incorporating 18 U.S.C. § 921(a)(24) (emphasis added).[12] This precludes any interpretation that a mere combination of parts, without intent, is a silencer.

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illegal use is not "designed" for the illegal use. Thus, "items which are principally used for nondrug purposes, such as ordinary pipes, are not 'designed for use' with illegal drugs." *Hoffman Estates* v. *Flipside*, 455 U.S. 489, 501 (1982).

[12] Moreover, in connection with a new provision in 18 U.S.C. § 921(a)(17)(B) concerning certain ammunition, the following definition was enacted: " 'handgun means any firearm including a pistol or revolver designed to be fired by the use of a single hand. *The term also includes any combination of parts from which a handgun can be assembled.*" P.L. 99-408, Section 10, 100 Stat. 920 (Aug. 28, 1986) (emphasis added).

In the Crime Control Act of 1990, Congress amended the Gun Control Act to provide: "It shall be unlawful for any person to *assemble from imported parts any semiautomatic rifle* or any shotgun which is identical to any rifle or shotgun prohibited from importation under § 925(d)(3) of this chapter as not being particularly suitable for or readily adaptable to sporting purposes. . . ." 18 U.S.C. § 922(r). In other words, a "rifle" does not exist until it is "assemble[d]" from "parts" (in this case, "imported parts").

By such enactments, Congress has again clearly expressed its intent that a combination-of-parts definition does not apply to rifles, and that even where it applies to certain NFA firearms, an intent requirement may exist.[13] BATF concedes that a combination-of-parts theory does not apply to possession of a complete pistol and a complete carbine, but illogically argues such theory if only one receiver is present. Nothing in the NFA justifies this expansion of the statute.

D. The Government Would Expand The Definition to Include A Product Capable Of Being Made Into A Taxable Rifle

Any conventional rifle can be made into an NFA firearm in a few seconds by sawing off the barrel. The government argues that mere capability of being made into an NFA firearm causes the Contender pistol and carbine kit to be an NFA firearm.

The government assumes that there is nothing to prevent a consumer from attaching the shoulder stock to the pistol. Imprisonment of ten years and a $10,000 fine seems adequate incentive to encourage consumers to ob-

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[13] The definitions of "destructive device" and "firearm silencer" both require that the combinations of parts be designed and/or intended to be assembled as such. Only "machinegun" does not include the intent requirement. "Rifle" has no combination of parts definition, with or without intent.

tain the Secretary's permission and pay a $200 tax before making a short barrel rifle. 26 U.S.C. §§ 5821, 5822, 5871. The government could also argue that there is nothing to prevent a dealer from selling Contender pistols and not paying income tax on the profits. Yet Thompson/Center is no more responsible for someone else's failure to pay a tax than it would be responsible for a murder committed with a Contender pistol and carbine kit.

BATF acknowledges that a complete pistol and complete carbine are *not* within the scope of the NFA unless the components are actually assembled as a short barrel rifle. (App. 3a) A complete pistol and a complete rifle are just as capable of assembly into a short barrel rifle as is a pistol and carbine kit, but do not constitute an NFA firearm unless "actually assembled" as such. The Petition's failure to mention this is revealing.

At oral argument, counsel showed the Claims Court actual samples of a complete pistol and a complete carbine—each with its own separate receiver—and illustrated with various tools how the barrels, shoulder stock, and grip are removed and assembled. (Appeals Appendix 107-109.) The government uses this demonstration to argue that a pistol and carbine *kit* may be used to "create" an NFA firearm. Petition 3 n.2. In fact, it showed that a complete pistol and a complete carbine—which is concededly not an NFA firearm—can be used to make such a firearm.

This demonstrates the absurdity of the agency's "one receiver" theory. If the pistol and carbine kit use the same receiver, a short-barrel rifle allegedly exists, even though one is never created. If two receivers are present —one for the pistol and one for the carbine—a short-barrel rifle admittedly does not exist. Nothing in the statute sanctions this contradictory result.

The NFA defines some firearms as combinations of parts (machineguns), others as combinations of parts with intent (destructive devices, silencers), and still others without any such definition (rifles). The government ignores these differences and claims that rifles are implicitly defined the same as machineguns.

"Rifle" means a "weapon" that has been 'made" (§ 5845(c)), not parts from which a weapon "can be made." *Any* rifle "can be made" into an NFA firearm by sawing off the barrel.[14] The government does not attempt to explain why other NFA firearms have combination-of-parts definitions but "rifle" does not.

Similarly, the government's discussion of the term "make" in § 5845(i) ignores why Congress saw fit to include "putting together" as a definition. There must be at least something that must be "put together" before it is an NFA firearm, or this definition would not exist. It must be an NFA firearm—such as "rifle"—that is not defined as a combination of parts. The government's focus on the definition of "make" as "or otherwise producing a firearm" begs the question, for it does not address when a firearm is made or produced.

The government assumes that lack of intent to make a Contender pistol and carbine kit into a short barrel rifle is irrelevant. However, all the evidence in the record is that no owner would have any intent to make such a rifle. The very definition of rifle includes the terms "*intended* to be fired from the shoulder." § 5845(c). It was never suggested in this case that Thompson/Center or anyone else did or would possess a pistol and carbine kit with the intent to make a weapon with a short barrel to be fired from the shoulder.

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[14] The government seems to assume that if a tax crime can be "quickly and easily" committed, then it already has been committed. Yet one has not murdered someone just because one could "quickly and easily" do so, and one has not violated the Internal Revenue Code just because one could "quickly and easily" do so.

When Congress intended that combinations of parts possessed with a certain "intent" were NFA firearms, it said so. §§ 5845(f)(3); 5845(a)(7) (incorporating 18 U.S.C. § 921(a)(24)). No such definition exists for "rifle."

In ordinary English, to be "restored" means to return to a previous condition. Congress recognized this in enacting both "readily restored" and "combination of parts" definitions of "machinegun." "The 'readily restorable' definition defines *weapons which previously could shoot* . . . but will not in their present condition." ATF Ruling 83-5, ATFB 1983-3, 35.

The government argues that Congress would not have adopted a readily-restorable test without also adopting a readily-convertible (or readily-makable) test. Petition 9. Congress did not do so, because every rifle is readily convertible in seconds by sawing to be a short-barrel rifle. It adopted no readily-makable test because pistol and rifle parts may be interchangeable; indeed, the government agrees that a complete pistol and complete carbine, while interchangeable, are not a short-barrel rifle. Perhaps Congress adopted a readily restorable test because the item had been a functional NFA firearm, was presumably possessed with intent to restore to such a weapon, and could be so restored in seconds (e.g., using a nail for a firing pin, such as in *United States* v. *Cosey*, 244 F. Supp. 100, 102 (E.D. La. 1965).

For whatever reasons, Congress chose the word "restore." The Contender pistol and carbine kit "can be assembled"—the government is careful not to say "restored"—into a short-barrel rifle in less than five minutes. Petition 9 n.7.

The government suggests that the Court's opinion would have a detrimental impact on enforcement of the firearms laws. No basis exists for this assertion. The only practical impact of the decision is that consumers need not purchase a complete pistol and a complete rifle—each with an identical receiver—but may purchase a pistol and rifle parts with only one receiver for use with each.

The government argues that some products, such as a bicycle, are shipped unassembled.[15] Petition 8. To use the same analogy, no one would say that bicycle handle bars are clubs, or that chains are weapons, just because they could be so used. Further, a bicycle is intended to be assembled into one and only one product, and is not defined in technical, legal terms in a taxing statute with criminal penalties. A better analogy would be a bottle, gas, and a rag, which constitute a Molotov-cocktail—an NFA firearm—only if assembled or intended to be assembled as such.[16]

The government misreads *Haynes* v. *United States*, 390 U.S. 85, 88 (1968), which states only that "the acts of *making* and *transferring* firearms are broadly defined." Petition 7. This only says that *any* making or transferring of a firearm are encompassed within the statute, not that the firearms themselves are broadly defined. *See United States* v. *Biswell*, 406 U.S. 311, 313 n.2 (1972) ("the sawed-off rifles . . . fell under 26 U.S.C. § 5845's technical definition of 'firearms'"). In fact, the NFA definition of "firearm" encompasses such guns as are generally known to be highly regulated, not such innocuous sporting guns as a Contender pistol and carbine

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[15] The government also states that rifles may be sold with bolts detached, and that shotguns have removable barrels. Petition 8 n.5. There is nothing in the record concerning this point. It could be that the bolts may be inserted in five seconds.

[16] As stated in *United States* v. *Posnjak*, 457 F.2d 1110, 1119 (2nd Cir. 1972): "When, however, the components are capable of conversion into both such a device and another object not covered by the statute, intention to convert the components into the 'destructive device' may be important."

kit.[17] The National Firearms Act "may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act. They are highly dangerous offensive weapons. . . ." *United States* v. *Freed*, 401 U.S. 601, 609 (1971). As noted by Justice Brennan, concurring: "the firearms covered by the Act are major weapons such as machine guns and sawed-off shotguns. . . . Without exception, the likelihood of governmental regulation of the distribution of such weapons is so great that anyone must be presumed to be aware of it." *Id.* at 616.

The government position in this case does not pass the above "smell test" set forth in *Freed*. No one would ever guess, much less presume, that a Contender pistol and carbine kit are supposedly a "major weapon" and an NFA firearm. Defendant argues that the NFA is generally applicable to "gangster-type" weapons, but does not contest that the Contender pistol and carbine kit is not a criminal-type weapon. Defendant's argument reduces to absurd, bureaucratic hair-splitting nowhere suggested in the statute: an NFA firearm exists if only one Contender receiver is used to make a pistol and carbine, but does not exist if two identical Contender receivers are used. Nothing in the statute even hints at this arbitrary distinction invented by the agency.

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[17] As stated in *United States* v. *Anderson*, 885 F.2d 1248, 1250 (5th Cir. 1989) (en banc):

> As used in the Act, the word "firearms" is a term of art that includes primarily weapons thought to be of a military nature and of no legitimate use for sport or self-defense. . . .
>
> Instead, the term is defined in the Act so as to narrow its meaning vastly in most respects. . . . Generally speaking, all such categories of ordinary rifles, pistols and shotguns as might be found in a gun shop are excluded from its meaning, with only a few easily-concealable items such as sawed-off shotguns included, along with machine guns.

II. THE DEFINITIONS AT ISSUE MUST BE CONSTRUED IN FAVOR OF THE TAXPAYER

Given the clear language of the statutory definitions, the Contender pistol and carbine kit do not constitute taxable "firearms" under § 5845(a). At the very least, considerable doubt exists as to whether the items are taxable.[18] Thus, this case comes under the rule set forth in *Gould* v. *Gould*, 245 U.S. 151, 153 (1917):

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.

The definitions in the National Firearms Act are subject to the above rule of construction. "On its face it [the NFA] is only a taxing measure . . . ." *Sonzinsky* v. *United States*, 300 U.S. 506, 513 (1937).[19] "In the exercise of its constitutional power to lay taxes, Congress may select the subjects of taxation, choosing some and omitting others." *Id.* at 512.

In addition, since it provides serious criminal penalties for violation, the National Firearms Act must be inter-

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[18] The government claims that the items here are "clearly" regulated weapons. Petition 5. In the court below it conceded: "When the facts of this case are compared to the language of § 5845, the statutory terms alone do not clearly indicate whether the Contender pistol and conversion kit together constitute a firearm." Appellee Brief 12.

[19] *Haynes* v. *United States*, 390 U.S. 85, 88 (1968) described the National Firearms Act as "an interrelated statutory system for the taxation of certain classes of firearms." "The making and transfer taxes under the NFA are a form of excise tax." *Thompson/Center Arms Co.* v. *Baker*, 686 F. Supp. 38, 42 (D.N.H. 1988) (holding that the Contender carbine kit must be litigated as a tax refund claim).

preted in favor of lenity. "We are here concerned with a taxing act which imposes a penalty. The law is settled that 'penal statutes are to be construed strictly,' . . . and that one 'is not to be subjected to a penalty unless the words of the statute plainly impose it' . . . ." [20] *Commissioner* v. *Acker*, 361 U.S. 87, 91 (1959).

The presence in NFA of three vastly different "combination of parts" definitions, and the absence thereof in the definition of "rifle," indicates that no such definitions apply to "rifle." *Commissioner* v. *Engle*, 464 U.S. 206, 223 (1984) states: "We must dismiss the Commissioner's reconstruction of the legislative intent as mere wishful thinking . . . . We have noted that '[t]he true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained if it be considered apart from related sections. . . .' "

Russello v. *United States*, 464 U.S. 16, 23 (1983) distinguishes a section of a criminal statute which "speaks broadly" of certain acts, from other sections with "less expansive language," and states:

> "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." . . . We refrain from concluding here that the differing language in the two subsections has the same meaning in each.

[20] " 'Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' . . . 'When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' " *United States* v. *Bass*, 404 U.S. 336, 347-48 (1971) (construing Gun Control Act terms in favor of felon in possession of firearms).

"Rifle" having no definition like "combination of parts when possessed with only one receiver," such definition may not be imposed by bureaucratic or judicial fiat. As stated in *Hanover Bank* v. *Commissioner*, 369 U.S. 672, 687-88 (1962):

> We are not at liberty . . . to add to or alter the words employed to effect a purpose which does not appear on the face of the statute. . . . Nevertheless, the Government now urges this Court to do what the legislative branch of the Government failed to do or elected not to do. This of course, is not within our province.

The government argues that the kit would allow a manufacturer to "avoid the tax." Petition 8. Yet it is perfectly legitimate to avoid taxation simply by not making a taxable product. As Judge Learned Hand remarked, "Over and over courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible." *Alinco Life Ins. Co.* v. *United States*, 178 Ct.Cl. 813, 373 F.2d 336, 345 (1967).

III. THE CIRCUITS ARE NOT IN CONFLICT

A. No Other Reported Cases Concern a Pistol and Carbine Kit

This is a case of first impression. Other than the Court of Appeals' decision, no other Court has ever addressed whether a pistol and carbine kit intended only for making a rifle with a barrel over 21″ nonetheless constitutes a rifle with a barrel under 16″. The circuits are not in conflict.

The government argues that a pre-1968 machinegun case is somehow relevant, because it was decided before Congress adopted "combination-of-parts" language. The government does *not* cite *United States* v. *Lauchli*, 371 F.2d 303, 311 (7th Cir. 1966), which stated "that the purchasers demanded operable machineguns, the defend-

ant assembled seven of them . . . ." The government does rely on *United States* v. *Kokin*, 365 F.2d 595, 596 (3rd Cir. 1966), but the conviction was affirmed "in the circumstances elaborated in the opinion of the district court . . . ." *Id.* at 596. While unpublished, that opinion was available to the court in *Lanchli*, which states: "As in *United* v. *Kokin*, . . . this defendant even assisted in the assembly of seven of the weapons." 371 F.2d at 313.

Besides machineguns, the government discusses silencers, which are equally irrelevant to the definition of "rifle."[21] Petition 8, 14. These silencer cases are further inapplicable because Congress revisted the issue in 1986, and determined which combination of parts would constitute silencers—i.e., parts "designed or redesigned, and *intended* for use in assembling or fabricating a firearm silencer."[22] This precludes combinations of parts which could be, but are not "intended" to be, assembled as silencers.

In *United States* v. *Woods*, 560 F.2d 660, 664-65 (5th Cir. 1977), *cert. denied* 435 U.S. 906 (1978), for purposes of finding probable cause for a search, the court held that a short barrel found near the rest of a shotgun "was capable of being 'readily restored to fire a

[21] The government relies on *United States* v. *Endicott*, 803 F.2d 506 (9th Cir. 1986) and *United States* v. *Luce*, 726 F.2d 47 (1st Cir. 1984). Unlike the pistol and carbine kit, there was only one manner in which to assemble these silencer parts, that manner was unlawful, and the parts "could be joined together within a few seconds." *Luce*, 726 F.2d at 49; *Endicott*, 803 F.2d at 509. These opinions approved jury instructions, and did not state as a matter of law that all such combinations of parts were silencers. *See* 803 F.2d at 508-509.

[22] 18 U.S.C. Sec. 921(a)(24); 26 U.S.C. Sec. 5845(a)(7). By requiring intent, the statutory amendment repudiates *Endicott* and *Luce*, which required no intent. Thus, Congress rejected these decisions on the very point for which the government relies on them—a strict liability, no intent, combination-of-parts definition for *every* NFA firearm.

fixed shotgun shell'. . . ."[23] Nothing in the case suggests that the short barrel was possessed for some innocent, nontaxable purpose.[24] The jury may well have heard evidence that the barrel had previously been attached to the rest of the weapon. By contrast, in the case at bar, the short barrel is possessed only for use in pistol configuration.

The government claims that *United States* v. *Combs*, 762 F.2d 1343, 1345 (9th Cir. 1985) is inapplicable (Petition 14 n.11), yet that case held a person to have "made" a short barrel rifle under Section 5845(i) because he assembled it as such:

> The Uzi rifle is sold in the United States with a 16-inch barrel and has a warning imprinted on it that it is illegal to modify the weapon in any way. In addition, the instructional manual that comes with the Uzi states that to take out the 16-inch barrel and replace it with a shorter barrel creates an illegal weapon. The evidence at trial indicated that *the barrel originally attached to the rifle was detached and the shortened barrel installed* in its place. . . . Combs *bought the shorter barrel and installed it. Thus the Uzi* was altered by Combs and therefore *was "made" within the terms of the statute. Id.* at 1347. (Emphasis added).

[23] None of the cases cited by the government, except *Drasen, infra*, involve a rifle. *E.g., United States* v. *Smith*, 477 F.2d 399 (8th Cir. 1973) (machinegun). In *United States* v. *Catanzaro*, 368 F. Supp. 450, 452 (D. Conn. 1973), which involved a readily restorable sawed-off shotgun, the court denied a motion to dismiss an indictment, and thus did not find that the item was an NFA firearm beyond a reasonable doubt. In neither of those cases were there legitimate, non-NFA uses for the items in question.

[24] Whether used with a shoulder stock or on a pistol, a shotgun (smooth bore) barrel under 18" makes an NFA firearm. 26 U.S.C. § 5845(a)(1), (5), (d), and (e). By contrast, the 10" Contender pistol barrel has a legitimate non-NFA purpose. Accordingly, comparisons to shotgun barrels are irrelevant.

B. While Flawed, *Drasen* Does Not Apply to the Products at Issue

The primary case relied on by the government is *United States* v. *Drasen*, 665 F. Supp. 598 (N.D. Ill. 1987), *rev'd* 845 F.2d 731 (7th Cir. 1988), *cert. denied* 488 U.S. 909 (1988). However, the Contender pistol and carbine kit is easily distinguishable from this opinion in which two judges could not agree with two other judges on whether rifle parts kits can be "rifles" for purposes of a pretrial motion to dismiss the indictment.[25]

The district court rejected the government's argument that the "readily restored" definition of "rifle" includes parts from which a rifle had never been constructed, because "all persons of common intelligence understand 'restore' to mean 'return to a previous condition.' People are not required to divine the government's secret modification of that definition . . . ." 665 F. Supp. at 603. The "weapon" definition of rifle does not apply because "the court has great difficulty seeing how the never-assembled constituent parts of a rifle are themselves a weapon 'made' to fire." *Id.* at 608.

In a 2-1 opinion, the Court of Appeals reversed and remanded to allow the fact finder to decide the issue. The court framed the issue to concern "constituent parts of a rifle" (845 F.2d at 732)—again distinguishing that case from the case at bar, in which indisputably the long barrel is the part of a rifle, and the short barrel is the part of a pistol.

The *Drasen* majority substitutes the euphemism "common sense interpretation" when it is unable to explain the clearly different definitions of rifle and machinegun. *Id.* at 731. Its reading into the statute of an implicit "combination-of-parts" definition for *all* NFA firearms is plainly inconsistent with the explicit "intent" require-

[25] The government's account of what *Drasen* "found" ignores that the case was remanded for trial. Petition 12-13.

ments in the definitions of destructive device and silencer.[26] This explains why the Congressional sponsors of new "combination of parts" language in the Firearms Owners' Protection Act of 1986 filed an amici curiae brief against the government's position in *Drasen*.[27]

The majority opinion in *Drasen* is based on an intellectually nihilistic inability to explain why an NFA "rifle" has no combination-of-parts definition, but three other NFA firearms do have such definitions. It is at a total loss to explain why rifle is defined as an operable "weapon"—"*intended* to be fired from the shoulder" at that—or as a "readily restorable" weapon, but that a machinegun is a weapon, a readily restorable weapon, *or* a combination of parts from which a complete weapon can be assembled.[28]

[26] The court was flatly wrong in asserting (845 F.2d at 735) that Congress did not amend the definition of silencer to include a combination-of-parts-plus-intent definition for "silencer." §§ 101, 109, P.L. 99-308, 100 Stat. 451, 460 (May 19, 1986).

[27] Amici included Senators Orrin E. Hatch and James A. McClure and Congressman Larry E. Craig. 845 F.2d at 732 n.4. Congressman Craig put forward as a floor amendment in the House the new definitions of silencer and machinegun. Senators Hatch and McClure explained the new definition of machinegun, which concerned conversion parts only. 132 CONG. REC. H1700 (Apr. 9, 1986); 132 CONG. REC. S5362-5363 (May 6, 1986).

[28] The majority's insinuation that the "combination-of-parts" definition means that "every single [machinegun] part could be subject to regulation" is nonsense. 845 F.2d at 737; *see* Petition 9. (It is unclear how this proves that rifle has some kind of implicit combination-of-parts definition.) The definition is not "any machinegun or part thereof," but is "any *combination* of parts from which a machinegun can be assembled if *such parts* are in the possession or under the control of a person." § 5845(b). As noted by Senators Hatch and Kennedy in debate on the 1986 amendments, most machinegun parts are not even regulated. 132 CONG. REC. S5362-63 (May 6, 1986).

The *Drasen* majority's argument was repudiated in *United States* v. *Bradley*, 892 F.2d 634, 636 (7th Cir. 1990), because "a statutory

Since the *Drasen* majority cannot explain why "rifle" has no combination-of-parts language but other firearms do, it attacks this "nonsensical statutory distinction" enacted by Congress and adds that "defendants would have us draw the conclusion that for some inexplicable reason Congress intended to distinguish short-barrel rifles." [29] 845 F.2d at 736-37. Congress can conjure up any "nonsense" it wishes, and give or not give "explicable" reasons, when it decides what to tax and what not to tax, and the latter is not thereby a "loophole" for courts to abrogate.

Since it seeks to impose a strict liability, combination-of-parts definition for all NFA firearms, the *Drasen* majority carefully ignores the definition of destructive device. A combination of parts from which a destructive device "could" be assembled—such as a bottle, firecracker, and paint thinner—is not such a device unless intent to do so exists. *United States* v. *Tankersley*, 492 F.2d 962, 966-67 (7th Cir. 1974). "While the components separately have social utility, in combination they form a destructive device. . . ." *Id.* The Contender pistol and carbine kit is no more an "unassembled" short-barrel rifle than gasoline, bottles, and rags in a household are "unassembled" Molotov cocktails and hence "destructive devices."

Drasen assumes that a manufacturer of a parts kit is responsible for a consumer committing a tax offense, i.e., making a short barrel rifle without following the procedures in the NFA. Yet firearms manufacturers are not responsible if a consumer commits a murder with a

machinegun" exists only "if one person has possession or control of *all* of the parts."

[29] Yet as Judge Manion noted in dissent, "the definition of 'machinegun' shows that when Congress wanted to regulate combinations of parts, or 'any' parts, it knew how to do so with precision. Congress has not included such precise language in the definition of rifle." *Id.* at 738.

firearm. *Martin* v. *Harrington & Richardson, Inc.*, 743 F.2d 1200, 1205 (7th Cir. 1984) held that "criminal misuse of a handgun is not a foreseeable consequence of gun manufacturing." If a handgun manufacturer is not responsible for a murder, it is difficult to understand why Thompson/Center is being held responsible because some consumer "could" commit a tax offense.

The majority opinion in *Drasen* frankly admits that the pertinent terms could easily be interpreted to exclude the items in question from being NFA firearms.[30] The court thereby completely disregards the cardinal principles that tax statutes are to be construed in favor of taxpayers, and that criminal statutes are to be resolved in favor of lenity.

C. At the Government's Urging, *Drasen* Was Based on a Revenue Ruling Which Was Revoked in 1972

The Petition is conspicuously silent about a revenue ruling on which the government relied in *Drasen* and in the Claims Court in this litigation. This silence may be attributable to the fact that only on appeal did Thompson/Center discover that the agency had long ago declared the ruling to be obsolete.

The Claims Court opined that "published revenue rulings are given weight, as they represent the agency's official interpretation of the statute. . . . Rev. Rul. 54-606, 1954-2, C.B. 33, held that possession of sufficient parts to assemble a firearm constitutes possession of a firearm." Appendix 28a. The Court then (*id.* n.2) cited

[30] The Court admits: "Applying the facts of this case, the statute on its face is not clear. . . . It is apparent that to clarify the statute, little additional language would have been needed to accomplish what the government claims Congress intended. The statute could have defined a rifle as also including the parts thereof that could be readily assembled to form a functioning weapon. . . . This definition ['make'] suggests that, to produce a firearm, 'putting together' the parts is necessary." *Id.* at 733.

Drasen, 845 F.2d at 736, which is the only published opinion ever to approve this 1954 Revenue Ruling.[31]

Instead of informing the court that Revenue Ruling 54-606 had been declared obsolete in 1972, the prosecution in *Drasen* claimed that the ruling "squarely decides the issue before this court."[32] The *Drasen* majority relied primarily on Revenue Ruling 54-606. In arguing that the Supreme Court not grant Drasen's petition for certiorari, the Solicitor General relied principally on the revenue ruling.[33]

While unknown to the Claims Court, to the *Drasen* majority, and to this Court when it considered Drasen's petition, the Department of the Treasury officially repudiated Rev. Ruling 54-606 in 1972. Because Congress clarified in the Gun Control Act of 1968 which NFA firearms would be defined as combinations of parts and which would not,[34] Revenue Ruling 72-178, 1972-1, C.B. 423-24 held:

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[31] In the Claims Court, the government repeatedly assured the court that Revenue Ruling 54-606 had never been modified or revoked. *E.g.*, Memo. in Opp. to Plaintiff's Mot. for Sum. Jud. at 4.

[32] Reply Brief for the United States, *United States* v. *Drasen*, U.S. Court of Appeals for the Seventh Circuit, at 8.

[33] *See* Memorandum for the United States in Opposition, *Drasen* v. *United States*, U.S. Sup. Ct., No. 88-430, at 2 which describes the dismissal of the indictment by the district court and states:

> The court of appeals, in a split decision, reversed (Pet. App. 1-16). The court relied on a formal ruling of the Commissioner of Internal Revenue interpreting the statute, after it was adopted in 1954, to reach the possession of sufficient parts to assemble an operative firearm. Rev. Rul. 54-606, 1954-2 C.B. 33.

The Solicitor General made several more references to the ruling and never informed the Court that the ruling had been revoked in 1972.

[34] Rev. Ruling 54-606 was not mentioned in the entire legislative record which culminated in the 1968 legislation. Without being aware of the ruling, Congress repudiated it except with regard to machineguns.

> Numerous changes in the law . . . necessitated a review of all outstanding revenue rulings issued under Chapter[] . . . 53 of the Internal Revenue Code of 1954 (the National Firearms Act] . . . .
>
> It has been determined that the following list of revenue rulings are inapplicable either in whole or in part to the current law and regulations . . . . Therefore, these revenue rulings are found to be no longer in effect, and are hereby declared to be obsolete. *Rev. Rul. No.* . . . . 54-606.

Nothing in the current regulations, 27 C.F.R. § 179.11, reflects or relates to Revenue Ruling 54-606 in any way.[35] The ruling was declared obsolete because it was "inapplicable either in whole or in part to the current law and regulations." Rev. Rul. 72-178. The "*current* law" was, of course, the 1968 amendments which clarified which firearms under the National Firearms Act include combinations of parts and which do not.

The court's lack of knowledge of this revocation has resulted in a grave miscarriage of justice. The *Drasen* case involved a criminal prosecution in which the liberties of citizens were at stake. It is unknown whether governmental counsel in *Drasen*—the Solicitor General, the Department of Justice attorneys, the U.S. attorney's office or BATF counsel—were aware that Revenue Ruling 54-606 was revoked. It is inconceivable that the 2-1 appellate decision in *Drasen*, or the Claims Court opinion in this case, would have heavily relied on a ruling known to be obsolete. The respective court's knowledge of this obsolete status may well have led to the opposite result.

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[35] 27 C.F.R. § 179.11 includes definitions of terms. The definitions of "rifle," "machinegun," and other firearms simply repeat verbatim the definitions in 26 U.S.C. § 5845. BATF has not published a single ruling which embodies the content of the revoked ruling, even though "it is the policy of the Bureau to publish in the [ATF] Bulletin all substantive rulings necessary to promote a uniform application of all laws administered by the Bureau. . . ." 27 C.F.R. § 71.41(d).

In sum, *Drasen*—the government's main "precedent"—is based on a revenue ruling which, unbeknown to the court, had been declared obsolete. The government's amnesia about its promotion of this revoked ruling illustrates the unreasonableness of its position in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 1991

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No. 91-164

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

THOMPSON/CENTER ARMS COMPANY, A DIVISION OF THE K.W. THOMPSON TOOL COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Cases:	Page
Chisom v. *Roemer*, 111 S. Ct. 2354 (1991)	6-7
Haynes v. *United States*, 390 U.S. 85 (1968)	6
United States v. *Drasen*:	
665 F. Supp. 598 (N.D. Ill. 1987)	8
845 F.2d 731 (7th Cir.), cert. denied, 488 U.S. 909 (1988)	3-4, 6, 7, 8
United States v. *Endicott*, 803 F.2d 506 (9th Cir. 1986)	4
United States v. *Kokin*, 365 F.2d 595 (3d Cir.), cert. denied, 385 U.S. 987 (1966)	4, 5
United States v. *Luce*, 726 F.2d 47 (1st Cir. 1984)	4, 6
United States v. *Woods*, 560 F.2d 660 (5th Cir. 1977), cert. denied, 435 U.S. 906 (1978)	4, 6
Statutes:	
Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213:	
§ 201, 82 Stat. 1230	7
§ 201, 82 Stat. 1231	4
National Firearms Act, 26 U.S.C. 5801 *et seq.*:	
26 U.S.C. 5845(a)	2
26 U.S.C. 5845(a)(2)	2
26 U.S.C. 5845(a)(3)	1, 2
26 U.S.C. 5845(b)	4, 5
26 U.S.C. 5848	6
26 U.S.C. 5848(1) (1964)	7
26 U.S.C. 5848(a)	7
Miscellaneous:	
H.R. Rep. No. 1577, 90th Cong., 2d Sess. (1968)	5
Rev. Rul. 54-606, 1954-2 C.B. 33	4, 7, 8
Rev. Rul. 61-45, 1961-1 C.B. 663	3, 4, 8
Rev. Rul. 61-203, 1961-2 C.B. 224	3, 4, 8
Rev. Rul. 72-178, 1972-1 C.B. 423	7, 8
S. Rep. No. 1501, 90th Cong., 2d Sess. (1968)	5, 7

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1. Much of respondent's factual discussion relates to its claim that the Thompson pistol and conversion kit will generally be used to produce "good" guns instead of "bad" guns. See Br. in Opp. 2, 4, 5, 6-7, 15. As we explain in the petition (Pet. 14), however, the question whether a particular weapon is used more often for "criminal" than for "sporting" purposes is not relevant under the National Firearms Act. A rifle is regulated under the Act if it has a short barrel. No more is required for the statute to apply. 26 U.S.C. 5845(a)(3).

Moreover, while respondent asserts that the "sportsmen who would use this product are *generally* law abiding" (Br. in Opp. 2) (emphasis added), respondent ultimately acknowledges that the short-barrel rifle resulting from use of its conversion kit "would have no sporting

utility" (*ibid.*).[1] Undeterred by this admission, respondent nonetheless suggests that its Contender system should not be subject to regulation because "a short-barrel rifle is less likely to be used in a crime than any other type of firearm" (Br. in Opp. 6-7). Respondent thus apparently believes that Congress should not have bothered to regulate short-barrel rifles. It is beyond question, however, that Congress chose to do so. See 26 U.S.C. 5845(a)(3).

Short-barrel rifles and shotguns are regulated because of their obvious potential for concealment. See 26 U.S.C. 5845(a)(2) and (3). Congress did not attempt to draw the ephemeral line that respondent proposes between "sporting" and "criminal" weapons.[2] Instead, Congress chose categorically to regulate certain types of weapons that it deemed generally reprehensible. Short-barrel rifles and shotguns are at the very top of the list of weapons that Congress chose to regulate. See 26 U.S.C. 5845(a).

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[1] Respondent claims that the "'design' of the manufacturer and the 'intent' of the user is to make a pistol with a 10" [inch] barrel or a rifle with a 21" [inch] barrel" (Br. in Opp. 5). Respondent cites no evidentiary support for this assertion, and there is none. Moreover, it is clear that the Thompson parts are also "designed" and "intended" by the manufacturer to be interchangeable in a way that produces a short-barrel rifle. Indeed, interchangeability is at the heart of the Contender's commercial concept. In fact, a short-barrel rifle can be assembled from the Contender conversion kit even more quickly and easily than a long-barrel rifle. See Pet. 3 & n.2.

[2] Respondent suggests that its Contender system is not as powerful as an Uzi and implies that it should therefore be judged by a different standard (Br. in Opp. 6). Respondent acknowledges (*id.* at 6-7 n.4), however, that Uzi makes a carbine as well as a machinegun. If Uzi were to manufacture a "conversion kit" to alter its carbine to a short-barrel rifle, it would be subject to the same regulatory framework as a "conversion kit" made by Thompson or any other manufacturer. Regulation under the National Firearms Act does not distinguish among rifles based upon their caliber or magazine size. The same standards apply to all rifles: they are regulated if they have short barrels. 26 U.S.C. 5845(a)(3).

Thompson's disagreement with this legislative determination is not a valid basis for evasion of the statute's plain commands.

Although respondent attempts to portray its pistol and conversion kit in glowing terms as a sportsman's gun (Br. in Opp. 3), neither the statute nor the case law supports any distinction between "good" and "bad" short-barrel rifles. It would have been simple enough for Thompson to design its pistol and rifle parts in a way that would prevent their interchangeability. Thompson's commercial interest in promoting the interchangeable features of its weapon system, however, is unquestionably not a proper basis for ignoring the statute. Nor is it a basis for ignoring the Treasury rulings that have long provided that a pistol possessed with an "attachable" shoulder stock is regulated as a short-barrel rifle under the National Firearms Act. Rev. Rul. 61-45, 1961-1 C.B. 663; Rev. Rul. 61-203, 1961-2 C.B. 224.

2. Respondent mistakenly asserts (Br. in Opp. 3, 13-18) that the Bureau of Alcohol, Tobacco and Firearms (BATF) has been inconsistent in its application of the statute to the Contender system. Respondent claims to be puzzled by the fact that BATF has approved the *separate* marketing of a complete Contender pistol or a complete Contender rifle but has determined that the *joint* marketing of the pistol with the conversion kit is subject to regulation. See Br. in Opp. 3-4.

There is no puzzle in these rulings. The BATF analysis has not been inconsistent. A Contender pistol, when sold *by itself* without a rifle stock, is not a short-barrel rifle. A Contender rifle, when sold *by itself* without a short barrel, is not a short-barrel rifle. But a Contender pistol, when sold or held with a conversion kit that permits the pistol to be assembled as a short-barrel rifle in less than five minutes (see Pet. 3 n.3), *is* subject to regulation because it contains all the components of a short-barrel rifle in user-ready form. See *United States* v. *Drasen*, 845 F.2d 731, 736-737 (7th Cir.), cert. denied, 488 U.S. 909 (1988). See also *United States* v. *Endicott*,

803 F.2d 506, 508 (9th Cir. 1986); *United States* v. *Luce*, 726 F.2d 47, 48-49 (1st Cir. 1984); *United States* v. *Woods*, 560 F.2d 660, 665 (5th Cir. 1977), cert. denied, 435 U.S. 906 (1978). The agency's rulings have consistently drawn and applied this very distinction for more than 30 years. See Rev. Rul. 61-45, *supra*; Rev. Rul. 61-203, *supra*.

3. Respondent claims (Br. in Opp. 8-10) that, when Congress amended the National Firearms Act in 1968, it rejected the prior decisions and rulings that established that a complete parts kit from which a regulated weapon may be assembled is itself regulated under the Act (see *United States* v. *Kokin*, 365 F.2d 595, 596 (3d Cir.), cert. denied, 385 U.S. 987 (1966); Rev. Rul. 54-606, 1954-2 C.B. 33). Respondent draws this conclusion from the fact that in the Gun Control Act of 1968, Pub. L. No. 90-618, § 201, 82 Stat. 1231, the definition of "machinegun" in Section 5845(b) of the National Firearms Act was amended to "include" (i) the "frame or receiver of any such weapon," (ii) any "combination of parts" designed for "converting a weapon into a machinegun," and (iii) any "combination of parts from which a machinegun can be assembled" (26 U.S.C. 5845(b)). Respondent claims (Br. in Opp. 8-13) that, by specifically "includ[ing]" a "combination of parts" from which a machinegun can be assembled within the statutory definition of "machinegun" in 1968, Congress necessarily intended to *exclude* a "combination of parts" from which a short-barrel rifle can be assembled from the statutory definition of regulated "rifles" under the Act.

This argument is based on a serious misreading of history. The Gun Control Act of 1968 was enacted soon after the assassinations of Martin Luther King, Jr. and Robert F. Kennedy. The Act represented a strong and swift political reaction to those events. The objective of the 1968 legislation was quite clearly to broaden, rather than narrow, the provisions of the National Firearms Act. The legislative findings in support of the Gun Control Act of 1968 recited:

> Handguns, rifles and shotguns have been the chosen means to execute three-quarters of a million people in the United States since 1900. The use of firearms in violent crimes continues to increase today. * * * No civilized society can ignore the malignancy which this senseless slaughter reflects.

H.R. Rep. No. 1577, 90th Cong., 2d Sess. 7 (1968). Congress noted its specific concern over the role played by rifles and shotguns in this "senseless slaughter" (*id.* at 8):

> Of the 6,500 firearms murders in the United States each year, 30 percent, or over 2,000, are committed with rifles or shotguns. * * * President Kennedy, Martin Luther King, Jr., Medgar Evers, and the 16 dead and 31 wounded victims of a deranged man firing from the tower of the University of Texas were all shot by rifles or shotguns.

It was against this background that Congress enacted the Gun Control Act of 1968 to "aid in curbing the problem of gun abuse that exists in the United States." S. Rep. No. 1501, 90th Cong., 2d Sess. 23 (1968). Congress succinctly described the revisions it enacted to the National Firearms Act in 1968 as "strengthening and clarifying amendments." *Id.* at 26.

One of the "strengthening and clarifying amendments" enacted in 1968 was the expansive definition of "machinegun" added in Section 5845(b) of the Act. This amendment codified the rationale of the decision in *United States* v. *Kokin*, 365 F.2d at 596, which held that a complete parts kit that could be used to make a machinegun was subject to regulation under the National Firearms Act (*ibid.*). The amendment also went much further, however, and specified that a single part such as a "receiver" or "frame" of a machinegun, or any parts designed for converting a weapon into a machinegun, is subject to regulation under the Act. See 26 U.S.C. 5845 (b); S. Rep. No. 1501, *supra*, at 45-46.

It distorts history as well as logic for respondent to suggest (Br. in Opp. 8-10) that by enlarging the scope

of regulation for machineguns in 1968 to "include" certain individual gun parts *as well as* conversion kits *and* complete parts kits used to make a "machinegun," Congress meant to narrow the definition of other sections of the Act to *exclude* from regulation an unassembled but complete parts kit that can be used to make a short-barrel "rifle." As all of the courts of appeals that had considered this question concluded prior to the decision in this case, the 1968 amendments to the National Firearms Act did not intend to alter the "common sense" result that a complete parts kit that can be assembled in the form of a regulated weapon is subject to the Act. See *United States* v. *Drasen*, 845 F.2d at 737; *United States* v. *Luce*, 726 F.2d at 49 ("Congress clearly intended this common sense interpretation."); *United States* v. *Woods*, 560 F.2d at 665 (the statute "does not specify that the parts must be assembled before it applies"). See also Pet. App. 31a. As the court of appeals stated in *United States* v. *Woods*, "to reason otherwise would be to frustrate or defeat the very purpose of the statute." 560 F.2d at 665.

This conclusion is quite obviously supported by history as well as by common sense. No one who lived through the events of that year could seriously contend that the Gun Control Act of 1968 was enacted "to frustrate or defeat" the regulation of short-barrel rifles and shotguns or in any other manner to *narrow* the preexisting, judicial or administrative construction of the National Firearms Act.[3] Cf. *Chisom* v. *Roemer*, 111 S. Ct. 2354, 2368

[3] Indeed, one of the specific objectives of the 1968 amendments to the National Firearms Act was to alter the result in *Haynes* v. *United States*, 390 U.S. 85 (1968), which held that, under the Act as it then existed, the privilege against compelled self-incrimination would provide "a full defense to prosecutions either for failure to register a firearm * * * or for possession of an unregistered firearm" (*id.* at 100). Congress amended Section 5848 of the National Firearms Act to avoid this result by prohibiting the use of registration information against the person filing it "as evidence * * * in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing" of that information. 26 U.S.C. 5848(a). See S. Rep. No. 1501, *supra*, at 26.

(1991) ("It is difficult to believe that Congress, in an express effort to broaden the protection afforded by the Voting Rights Act, withdrew, without comment, an important category of elections from that protection.").

4. The Treasury has also consistently ruled that a complete parts kit for use in assembling a regulated weapon is subject to the Act. This "common sense" conclusion was expressed in Rev. Rul. 54-606, 1954-2 C.B. 33, which stated:

> Where an individual, partnership, company, association, or corporation has possession or control of sufficient parts to assemble an operative firearm as defined in section 5848(1) of the Internal Revenue Code of 1954, the possession or control thereof constitutes a "firearm."[4]

In 1972, this Ruling—along with more than 100 other rulings issued under the Internal Revenue Code chapters dealing with alcohol, tobacco and firearms regulation—was "declared to be obsolete." Rev. Rul. 72-178, 1972-1 C.B. 423.[5] By declaring Rev. Rul. 54-606 to be "obsolete,"

[4] The Gun Control Act of 1968, Pub. L. No. 90-618, § 201, 82 Stat. 1230, relocated the definition of "firearm" from Section 5848(1), 26 U.S.C. (1964), to Section 5845(a) of the Internal Revenue Code. See S. Rep. No. 1501, *supra*, at 44.

[5] In *United States* v. *Drasen*, 845 F.2d at 736, the court of appeals concluded that, in enacting the Gun Control Act of 1968, Congress intended to incorporate this ruling as part of the "administrative construction of existing law." *Ibid.* See S. Rep. No. 1501, *supra*, at 46. The *Drasen* court concluded, moreover, that the "ruling did not amend the statute, but was in keeping with the common sense interpretation of the statute." 845 F.2d at 735.

It appears that none of the parties in *Drasen* were aware that Rev. Rul. 54-606, *supra*, had been declared obsolete in 1972. Indeed, respondent's counsel, who now tries to make much of this fact (Br. in Opp. 27-29), himself filed an amicus brief in *Drasen* without noting that the Ruling had been declared obsolete. See Gov't. Opp. to Mot. for Attorneys Fees in Ct. App. 8.

however, the Treasury did not revoke or repudiate the position set forth in the Ruling. To the contrary, as the agency noted, a ruling may become obsolete solely because "the subject matter of the ruling is now specifically covered by regulations." 1972-1 C.B. 423. With respect to Rev. Rul. 54-606, the statutory inclusion of parts kits for "machineguns" in the 1968 amendments to the National Firearms Act had been paralleled by even earlier regulatory rulings that had concluded that pistols with short barrels and "attachable" rifle stocks were subject to regulation as short-barrel rifles. See Rev. Rul. 61-45, 1961-1 C.B. 663; Rev. Rul. 61-203, 1961-2 C.B. 224. These rulings specifically determined that pistol "conversion kits" similar to the Contender system were regulated under the Act. These rulings have been uniformly applied by BATF and have remained in effect at all times since their initial promulgation in 1961. Respondent thus errs in contending (Br. in Opp. 28-29) that a complete kit for assembling a regulated short-barrel rifle from an unregulated pistol has not consistently been subject to regulation under the agency's rulings.

5. Respondent attempts to distinguish *United States* v. *Drasen* on the theory that *Drasen* "does not apply to the products at issue" (Br. in Opp. 24). Since *Drasen*, like the present case, involved a complete parts kit for the assembly of short-barrel rifles (845 F.2d at 732-736), it is unclear what respondent means. Moreover, in *Drasen*, as in the present case, the manufacturer's parts kit was one that "might or might not be assembled to form a short-barrel rifle" (845 F.2d at 732). See also Pet. 13 n.9.[6]

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[6] The district court in *Drasen* specifically noted that, under the government's theory of the statute, "a person who deals in [long-barrel rifle] parts [who] also happens to possess independently a single short-barrel part" would be subject to regulation under the National Firearms Act. 665 F. Supp. 598, 613 (N.D. Ill. 1987).

The only relevant difference between the two decisions is that in *Drasen* the court of appeals agreed with the numerous, prior decisions holding that a complete, but partially unassembled, regulated weapon constitutes a "firearm" under the Act. See Pet. 12-13. By contrast, in the decision below, the court of appeals disagreed with that conclusion and furthermore attempted to distinguish these prior decisions on the legally irrelevant basis that the Contender system is not a "gangster-type" weapon (Pet. App. 15a).

The conflict thus created among the courts of appeals by the decision in this case threatens to undermine basic enforcement of the Act. See Pet. 15-16. While respondent glibly forecasts that the decision below "will not cause the sky to fall" (Br. in Opp. 7), respondent offers no explanation of how, under the decision in this case, the National Firearms Act may be enforced against the street criminal or importer who maintains a regulated short-barrel rifle in a partially unassembled state. While other courts of appeals, as well as the Claims Court in this case (Pet. App. 28a-31a), have concluded that Congress intended to prohibit this facile circumvention of the Act, the decision in this case expressly allows that result.

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted.

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No. 91-164

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

THOMPSON/CENTER ARMS COMPANY, A DIVISION OF THE K.W. THOMPSON TOOL COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Respondent manufactures pistols and "conversion kits" that allow the pistols readily to be converted into rifles with 10-inch barrels. Under the National Firearms Act, a manufacturer who "makes" a rifle with a barrel shorter than 16 inches (a short-barrel rifle) must register the firearm in the National Firearms Registry and pay a tax of $200. 26 U.S.C. 5841, 5845(a)(3).

The question presented is whether respondent "makes" a short-barrel rifle by packaging and distributing the pistol together with the conversion kit and is therefore required to register the firearm and pay the tax due under the National Firearms Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	6
Argument:	
A pistol with a barrel shorter than 16 inches that is packaged for distribution together with a conversion kit containing an attachable shoulder stock is a regulated "firearm" under the National Firearms Act	7
A. The National Firearms Act regulates all short-barrel rifles and similar weapons that are capable of concealment	7
B. Pistols with short barrels and attachable shoulder stocks are regulated as short-barrel rifles under the National Firearms Act	10
C. Other provisions of the National Firearms Act are consistent with and do not alter this conclusion	17
Conclusion	26

TABLE OF AUTHORITIES

Cases:

CFTC v. *Schor*, 478 U.S. 833 (1986)	17
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	17
Chisom v. *Roemer*, 111 S. Ct. 2354 (1991)	22-23
Haynes v. *United States*, 390 U.S. 85 (1968)	7, 10, 22
National Muffler Dealers Ass'n v. *United States*, 440 U.S. 472 (1979)	15, 16
Thompson/Center Arms Co. v. *Baker*, 686 F. Supp. 38 (D.N.H. 1988)	4
United States v. *Alpers*, 338 U.S. 680 (1950)	7, 26
United States v. *Catanzaro*, 368 F. Supp. 450 (D. Conn. 1973)	18

Cases—Continued: Page

United States v. *Combs*, 762 F.2d 1343 (9th Cir. 1985) 14
United States v. *Correll*, 389 U.S. 299 (1967) 15
United States v. *Drasen*, 845 F.2d 731 (7th Cir.), cert. denied, 488 U.S. 909 (1988) 5, 10, 13, 15, 16, 18, 19, 21, 22, 24, 25, 26
United States v. *Endicott*, 803 F.2d 506 (9th Cir. 1986) 12, 16, 18, 22, 24, 25
United States v. *Kokin*, 365 F.2d 595 (3d Cir. 1966), cert. denied, 385 U.S. 987 (1966) 12, 13, 20, 21, 24, 25
United States v. *Lauchli*, 371 F.2d 303 (7th Cir. 1966) 12, 24
United States v. *Luce*, 726 F.2d 47 (1st Cir. 1984) 10, 12, 16, 17, 22, 24, 25
United States v. *Smith*, 477 F.2d 399 (8th Cir. 1973) 18
United States v. *Thompson*, 202 F. Supp. 503 (N.D. Cal. 1962) 18
United States v. *Woods*, 560 F.2d 660 (5th Cir. 1977), cert. denied, 435 U.S. 906 (1978) 10, 11, 12, 17, 20, 22, 24, 25
United States v. *Zeidman*, 444 F.2d 1051 (7th Cir. 1971) 11, 12, 13

Statutes:

Anti-Injunction Act, 26 U.S.C. 7421 4
Declaratory Judgment Act, 28 U.S.C. 2201 4
Firearms Owners' Protection Act, Pub. L. No. 99-308, § 101, 100 Stat. 451 12-13
Gun Control Act of 1968, Pub. L. No. 90-618, § 201, 82 Stat. 1231 ..... 12, 19
National Firearms Act, 26 U.S.C. 5801 *et seq.* 7
26 U.S.C. 5801 8
26 U.S.C. 5801 (a) (1) 4
26 U.S.C. 5802 8
26 U.S.C. 5811 8
26 U.S.C. 5821 ..... 2, 3, 8
26 U.S.C. 5821 (a) 4
26 U.S.C. 5822 4
26 U.S.C. 5841 ..... 2, 8

Statutes—Continued: Page

26 U.S.C. 5841 (b) 3, 9, 14
26 U.S.C. 5844 25
26 U.S.C. 5845 ..... 2, 5
26 U.S.C. 5845 (a) 8, 14
26 U.S.C. 5845 (a) (1)-(5) 8
26 U.S.C. 5845 (a) (3) 2, 3, 5, 6, 9, 10, 15, 19
26 U.S.C. 5845 (a) (6)-(8) 8
26 U.S.C. 5845 (a) (7) 13, 23
26 U.S.C. 5845 (b) 5, 12, 19, 21
26 U.S.C. 5845 (c) 3, 9, 10, 17, 18
26 U.S.C. 5845 (e) 8
26 U.S.C. 5845 (f) 5, 8, 19
26 U.S.C. 5845 (i) 9, 10
26 U.S.C. 5848 22
26 U.S.C. 5848 (a) 23
26 U.S.C. 5861 (d) 3
26 U.S.C. 5861 2
26 U.S.C. 5871 ..... 3, 8
18 U.S.C. 921 (a) (24) 13, 23

Miscellaneous:

Armor Piercing Ammunition and the Criminal Misuse and Availability of Machineguns and Silencers: Hearings on H.R. 641 and Related Bills Before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong., 2d Sess. (1984) 23-24
37 Fed. Reg. 11,896 (1972) .....
H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954) 7
H.R. Rep. No. 1577, 90th Cong., 2d Sess. (1968) 20
H.R. Rep. No. 495, 99th Cong., 2d Sess. (1986) 6-7, 23
Rev. Rul. 61-45, 1961-1 C.B. 663 ....15, 17, 18
Rev. Rul. 61-203, 1961-2 C.B. 224 ....15, 17, 18
S. Rep. No. 1501, 90th Cong., 2d Sess. (1968) 18, 21, 23

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-164

UNITED STATES OF AMERICA, PETITIONER

v.

THOMPSON/CENTER ARMS COMPANY,
A DIVISION OF THE K.W. THOMPSON
TOOL COMPANY, INC.

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*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 924 F.2d 1041. The petition for rehearing and suggestion of rehearing en banc were denied without opinion (Pet. App. 33a, 34a). The opinion of the Claims Court (Pet. App. 18a-32a) is reported at 19 Cl. Ct. 725.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1991. The order denying the petition for rehearing was entered on March 29, 1991 (Pet. App. 33a). The Chief Justice extended the time for

filing a petition for a writ of certiorari to and including July 27, 1991. The petition was filed on July 26, 1991, and was granted on October 7, 1991. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of Sections 5821, 5841, 5845 and 5861 of the National Firearms Act, as amended, 26 U.S.C. 5821, 5841, 5845, 5861, are set forth at Pet. App. 35a-37a.

STATEMENT

1. The Thompson/Center Arms Company (Thompson) manufactures a single-shot pistol (the "Contender" model) with a receiver that is designed, as a commercially attractive feature, to accept interchangeable barrels of differing lengths and calibers. Thompson also manufactures a "conversion kit" that includes a long barrel and a rifle stock that may be attached to the Contender pistol receiver to convert it into a rifle (Pet. App. 2a).[1] If the shorter, pistol-length barrel is not removed from the receiver when the rifle stock is added, however, the resulting combination is a "short-barrel rifle" that falls within the definition of a "firearm" under Section 5845(a)(3) of the National Firearms Act, 26 U.S.C. 5845(a)(3).[2]

[1] The receiver of the pistol is the metal frame housing the action, trigger and hammer. The rifle shoulder stock is a wooden support that attaches to the rear of the receiver and rests against the shoulder during firing. The rifle forend is a wooden piece that attaches under the barrel and provides a forward handrest to support the rifle during firing (Pet. App. 19a n.1).

[2] The Contender pistol has a 10-inch barrel (Pet. App. 2a). A "rifle" results when the shoulder stock is added to the pistol

The maker of a "firearm," as so defined, is required to pay a tax of $200 for each weapon and register it in the National Firearms Registry. 26 U.S.C. 5821, 5841(b). Moreover, it is a crime punishable by a fine of up to $10,000, or imprisonment for up to ten years, or both, for a person "to receive or possess" a "firearm" if it "is not registered to him" (26 U.S.C. 5861(d), 5871).

The conversion kit manufactured by Thompson is quick, and easy to use.[3] By employing "simple, readily available tools," "a short-barrel rifle could be assembled in less than five minutes—even more easily and readily than a long-barrel rifle—since the barrels would not have to be changed" (Pet. App. 29a).

In 1985, Thompson was advised by the Bureau of Alcohol, Tobacco and Firearms (BATF) that, when the conversion kit was possessed or distributed with the Contender pistol, the unit constituted a firearm subject to the Act (Pet. App. 3a).[4] In response to

receiver, for the weapon in that form is designed "to be fired from the shoulder" (26 U.S.C. 5845(c)). A "rifle" with a barrel less than 16 inches long (commonly referred to as a "short-barrel rifle") is a "firearm" subject to the registration and tax requirements of the National Firearms Act (26 U.S.C. 5845(a)(3)).

[3] Indeed, the process is so simple that, in a demonstration conducted in open court, counsel for respondent was able to alter the pistol into a short-barrel rifle in a matter of a few minutes (Pet. App. 29a).

[4] BATF also informed Thompson, however, that the separate marketing of a *complete* pistol and a *complete* carbine would not by itself fall within the scope of the Act (Pet. App. 3a, 21a). BATF had provided Thompson with this same advice 14 years earlier (in 1971), when Thompson first inquired as to the legality of using the Contender pistol receiver to make a single-shot carbine with a barrel 18 inches long and a full shoulder stock (Pet. App. 2a).

this advice, Thompson submitted an Application to Make and Register a Firearm and paid the applicable $200 tax for the making of a single such firearm (*id.* at 21a). The application sought permission "to make, use, and segregate as a single unit" a package consisting of a serially numbered pistol together with an attachable shoulder stock and a 21-inch barrel.[5] BATF approved the application. Thompson then filed a tax refund claim, asserting that the unit it had registered was not a "firearm" because the component parts of the Contender conversion kit and pistol had not been assembled by Thompson as a short-barrel rifle (Pet. App. 22a).

2. When the refund application was not approved, Thompson commenced this action in the Claims Court.[6] The court held that the Contender pistol, when possessed together with the conversion kit, constitutes a short-barrel rifle and is therefore a "firearm" under the Act (Pet. App. 18a-32a). The court specifically rejected Thompson's argument that the component parts of the pistol and kit must first be assembled as a short-barrel rifle before they could be deemed to be a firearm (*id.* at 29a-30a). The court concluded that both the language of Section 5845 and its legislative history, together with the relevant case law and "ordinary common sense," lead "inexorably to [the] conclusion that the Contender pistol in conjunction with the [conversion kit] is a firearm under the National Firearms Act" (Pet. App. 31a). The court therefore granted summary judgment to the government (*id.* at 32a).

3. The court of appeals reversed. The court concluded that a short-barrel rifle "actually must be assembled" (Pet. App. 4a-5a) in order to be "made" within the meaning of the statute (*id.* at 6a). The court based its conclusion on the statutory description of a short-barrel rifle as one "having" a barrel less than 16 inches in length (26 U.S.C. 5845(a)(3)) and stated that such a "firearm must exist in fact, not in contemplation, to be 'made' within the meaning of the statute" (Pet. App. 5a). The court further noted that other provisions of the Act require registration of any "combination of parts" used to convert an unregulated weapon into a machine gun or other "destructive device" (26 U.S.C. 5845(b) and (f)), but the statute has no similar, specific provision requiring registration of a "combination of parts" for use in converting a weapon into a short-barrel rifle (Pet. App. 7a-8a). The court acknowledged that, in *United States* v. *Drasen*, 845 F.2d 731, cert. denied, 488 U.S. 909 (1988), the Seventh Circuit had "held that complete but unassembled short-barrel rifle parts kits were 'rifles' within the meaning of Section 5845(c)" (Pet. App. 17a). The court concluded,

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[5] See C.A. App. 123. Under the National Firearms Act, a manufacturer must first make application and receive permission from the Treasury Department to make a firearm subject to the requirements of the Act (26 U.S.C. 5822). Thompson elected not to seek qualification as a firearms manufacturer under 26 U.S.C. 5801(a)(1) (which requires payment of an occupational tax of $1,000) and instead sought permission to make firearms as a non-qualified manufacturer under 26 U.S.C. 5821(a) (which requires payment of a $200 tax for each firearm made).

[6] Thompson had previously filed suit in federal district court seeking a declaratory judgment that the Contender pistol and the Contender Carbine Kit did not comprise a "firearm" under the National Firearms Act. *Thompson/Center Arms Co.* v. *Baker*, 686 F. Supp. 38 (D.N.H. 1988). The district court held that it lacked subject matter jurisdiction over Thompson's suit under the Anti-Injunction Act (26 U.S.C. 7421) and the tax exception to the Declaratory Judgment Act (28 U.S.C. 2201). 686 F. Supp. at 44.

however, that, to the extent "that *Drasen* is inconsistent with our decision here, we decline to follow it" (*ibid.*).

SUMMARY OF ARGUMENT

The court of appeals' holding in this case does grave violence to the statutory scheme carefully crafted by Congress. The National Firearms Act draws no distinctions based upon rate of fire, magazine capacity or criminal appeal in imposing registration and tax requirements on concealable weapons such as short-barrel rifles. A rifle is regulated under the Act if it has a short barrel. No more is required for the statute to apply. 26 U.S.C. 5845(a)(3).

The fact that a short-barrel rifle, or any other "firearm," is possessed or sold in a partially unassembled state does not remove it from regulation under the Act. Many ordinary products (including rifles and shotguns) are commonly sold in a partially unassembled state. To say that a product thus produced has not been "made" until it is fully assembled by the purchaser runs contrary to "ordinary common sense" (Pet. App. 31a).

For more than thirty years, the Treasury has consistently ruled that pistols with short barrels that are held in conjunction with a conversion kit that includes a shoulder stock are regulated as short-barrel rifles under the Act. This consistent administrative interpretation of the definitional terms of the Act by the agency responsible for its enforcement is entitled to substantial deference.

In amending statutory provisions that concern different types of firearms, Congress has recognized that "complete kits" for assembling a regulated firearm are subject to regulation under the Act. H.R. Rep.

No. 495, 99th Cong., 2d Sess. 21 (1986). Prior to the decision in this case, the courts of appeals had consistently reached this same conclusion.

The comprehensive statutory scheme that Congress erected would be rendered ineffective if manufacturers were allowed to circumvent the Act by the simple expedient of manufacturing and selling otherwise regulated firearms in a partially unassembled state. The decision in this case thus ignored this Court's admonition that the language of a statute should "not be distorted under the guise of construction, or so limited by construction as to defeat the manifest intent of Congress." *United States* v. *Alpers*, 338 U.S. 680, 681-682 (1950).

ARGUMENT

A PISTOL WITH A BARREL SHORTER THAN 16 INCHES THAT IS PACKAGED FOR DISTRIBUTION TOGETHER WITH A CONVERSION KIT CONTAINING AN ATTACHABLE SHOULDER STOCK IS A REGULATED "FIREARM" UNDER THE NATIONAL FIREARMS ACT

A. The National Firearms Act Regulates All Short Barrel Rifles And Similar Weapons That Are Capable Of Concealment

The National Firearms Act (26 U.S.C. 5801 *et seq.*) was enacted in 1934 to restrict access to certain comprehensively-defined, undesirable classes of weapons. See H.R. Rep. No. 1337, 83d Cong., 2d Sess. A395 (1954); *Haynes* v. *United States*, 390 U.S. 85, 87-88 (1968). The Act's restrictions apply to two general types of weapons: (i) concealable rifles, shotguns, and similar weapons; and (ii) exotic and especially lethal weapons. The concealable weapons that are regulated under the Act include short-barrel shot-

guns (with barrels less than 18 inches), short-barrel rifles (with barrels less than 16 inches), and "any other" shotgun, rifle or smooth-bored pistol "capable of being concealed on the person." 26 U.S.C. 5845 (a)(1)-(5) and (e). The exotic and especially lethal weapons that are regulated under the Act include machineguns, silencers, and "destructive devices" such as bombs, grenades, rockets, missiles, mines or similar devices. 26 U.S.C. 5845(a)(6)-(8) and (f). Any weapon that falls within either regulated category is termed a "firearm" under the Act. 26 U.S.C. 5845(a).

All such "firearms" must be registered in a national registry (26 U.S.C. 5841) and every person who manufacturers, transfers, imports or deals in "firearms" is subject to special occupational and excise taxes under the Act (26 U.S.C. 5801, 5802, 5811, 5821). To enforce these broad regulatory provisions, Congress has enacted substantial criminal penalties for possession of unregistered "firearms" and for any other failure to comply with the requirements of the Act. 26 U.S.C. 5871. See p. 3, *supra*.

The narrow issue in this case is whether a Contender pistol with a 10-inch barrel, packaged for distribution together with an attachable shoulder stock and a long barrel, constitutes a "short-barrel" rifle subject to the registration and tax provisions of the Act. Although the court below emphasized that the Contender is not a "gangster-type" weapon (Pet. App. 15a), the fact that the Contender, in its original form, is a single shot target pistol is immaterial. The Act draws no distinctions based on rate of fire, magazine capacity or criminal appeal in imposing registration and tax requirements on concealable weapons. The question whether a short-barrel rifle is used more often for "criminal" than for "sporting"

purposes is not relevant under the Act.[7] A rifle is regulated under the Act if it has a short barrel. No more is required for the statute to apply. 26 U.S.C. 5845(a)(3). Precisely because of the infinite variety with which weapons may be designed, the statutory regulation of concealable weapons necessarily employs broadly inclusive classifications.

Section 5845(a)(3) of the Act thus includes within the definition of a regulated "firearm" *any* "rifle having a barrel or barrels of less than 16 inches in length." 26 U.S.C. 5845(a)(3). A "rifle," in turn, is defined broadly in Section 5845(c) as

> a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

26 U.S.C. 5845(c). The Act requires any person who makes such a weapon to register it (26 U.S.C. 5841(b)), and the term "make" is, in turn, broadly defined in Section 5845(i) to "include":

> manufacturing * * *, putting together, altering, any combination of these, or otherwise producing a firearm.

26 U.S.C. 5845(i). As this Court has observed, in order to accomplish the comprehensive objectives of

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[7] While respondent maintains that the users of the Contender system "are generally law-abiding" (Br. in Opp. 2), respondent ultimately acknowledges that the short-barrel rifle resulting from use of its conversion kit "would have no sporting utility" (*ibid.*).

the statute, "the acts of making and transferring firearms are broadly defined" under the National Firearms Act. *Haynes* v. *United States*, 390 U.S. at 88.

B. Pistols With Short Barrels And Attachable Shoulder Stocks Are Regulated As Short-Barrel Rifles Under The National Firearms Act

1. When the components necessary to assemble a rifle are produced and held in conjunction with one another, a "rifle" is the result. A unit that includes a receiver, a 10-inch barrel, and a shoulder stock is literally a weapon "designed * * * and intended to be fired from the shoulder" with "a barrel or barrels of less than 16 inches in length." 26 U.S.C. 5845(a)(3) and (c). The fact that it may be possessed and sold in a partially unassembled state does not render it any less a "firearm" within the contemplation of the Act. See *United States* v. *Drasen*, 845 F.2d at 737.

By concluding that a firearm is not "made" until it is fully assembled (Pet. App. 4a), the court of appeals failed to follow the plain language and evident meaning of the statute. As the Seventh Circuit concluded in *United States* v. *Drasen*, by placing the registration and tax requirements on persons "manufacturing * * * or otherwise producing a firearm" (26 U.S.C. 5845(i)), the statute applies directly to manufacturers who distribute "a complete parts kit ready to be assembled." 845 F.2d at 737. See also *United States* v. *Woods*, 560 F.2d 660, 665 (5th Cir. 1977) (the statute "does not specify that the parts must be assembled before it applies"), cert. denied, 435 U.S. 906 (1978); *United States* v. *Luce*, 726 F.2d 47, 49 (1st Cir. 1984) ("Congress clearly

intended this common sense interpretation"); *United States* v. *Zeidman*, 444 F.2d 1051, 1053 (7th Cir. 1971) (pistol and attachable shoulder stock found "in different drawers of the same dresser" constitute a short-barrel rifle that is "required to be registered" under the Act). After all, many ordinary products (including rifles and shotguns) are commonly sold in a partially unassembled state, and to say that a product thus produced has not been "made" until it has been fully assembled by the purchaser runs counter to "ordinary common sense" (Pet. App. 31a).[8]

Indeed, to conclude that a manufacturer does not "make" a firearm if the weapon is shipped and sold in a partially unassembled state is as unpersuasive as arguing that a bicycle manufacturer does not "make" a bicycle if it is shipped or sold with the handlebars and seat unattached. See note 8, *supra*. If a firearms manufacturer packages as a unit all of the parts needed readily to assemble a firearm, the manufacturer has "made" a firearm in any ordinary sense of the term. See *United States* v. *Woods*, 560 F.2d at 665 ("to reason otherwise would be to frustrate or defeat the very purpose of the statute"). If the contrary were true, any manufacturer would be able to avoid the tax and registration requirements of the Act by the rudimentary artifice of marketing

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[8] For example, rifles are packaged, shipped and sold with their bolts (and sometimes other parts) detached and could not be fired until fully assembled. Shotguns are manufactured and marketed with removable barrels. But it could hardly be said that gun manufacturers such as Remington Arms, Uzi and Thompson therefore do not "manufacture" guns. That would be like saying that Schwinn does not "manufacture" bicycles.

its products in a "kit" form that requires some assembly by the purchaser.[9]

Accordingly, in both *United States* v. *Lauchli*, 371 F.2d 303, 311-313 (7th Cir. 1966), and *United States* v. *Kokin*, 365 F.2d 595, 596 (3d Cir. 1966), cert. denied, 385 U.S. 987 (1966), the courts held that the transfer of parts from which operative machine guns could be assembled constituted the transfer of machine guns under the Act.[10] Similarly, in *United States* v. *Luce*, 726 F.2d 47, 48-49 (1st Cir. 1984), and *United States* v. *Endicott*, 803 F.2d 506, 508-509 (9th Cir. 1986), the courts held that the unassembled component parts of silencers constituted silencers within the meaning of the Act. As the First Circuit stated in *United States* v. *Luce*, 726 F.2d at 48-49, although the Act "does not expressly define 'silencer' to include component parts of a silencer that are 'readily available [and capable of assembly] with only a brief and minimal effort,' we agree with the district court that Congress clearly intended this common sense interpretation." [11]

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[9] In *United States* v. *Woods*, 560 F.2d at 664, the court specifically rejected the claim that partial disassembly can defeat the obvious breadth of the statute: "The fact that the weapon was in two pieces when found is immaterial considering that only a minimum of effort was required to make it operable." *Ibid.* See also *United States* v. *Zeidman*, 444 F.2d at 1053.

[10] After *Lauchli* and *Kokin* were decided, the definition of "machinegun" was amended by the Gun Control Act of 1968, Pub. L. No. 90-618, § 201, 82 Stat. 1231, specifically to include a "combination of parts" from which a machinegun could be assembled. 26 U.S.C. 5845(b). See pp. 19-23, *infra*.

[11] In 1986, Congress codified the result of *Luce* and *Endicott* by amending the definition of "silencer" to include a "combination of parts" from which a silencer may be assembled in the Firearms Owners' Protection Act, Pub. L. No. 99-308, § 101, 100 Stat. 451. See 26 U.S.C. 5845(a)(7); 18 U.S.C. 921(a)(24). See pp. 24-25, *infra*.

In the present case, the court of appeals attempted to distinguish these decisions on the basis that they "involved unassembled parts that could *only* be assembled as illegal firearms" (Pet. App. 17a).[12] This purported distinction, however, is both factually inaccurate and legally irrelevant. It is factually inaccurate because the M-1 carbine in *Kokin* and the pistol in *Zeidman* were operational, unregulated weapons; they were subject to the Act because they were held in conjunction with components suitable for ready alteration of the weapons to regulated form. See *United States* v. *Zeidman*, 444 F.2d at 1053 (alterable to short-barrel rifle); *United States* v. *Kokin*, 365 F.2d at 596 (alterable to machinegun). See also *United States* v. *Drasen*, 845 F.2d at 732 (manufacturer's parts kit was one that "might or might not be assembled to form a short-barrel rifle"). The asserted distinction is also legally irrelevant because, when a weapon comes within the scope of the "firearm" definition, the fact that it may also have a non-regulated form is not a permissible basis for

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[12] The court of appeals also considered it important (Pet. App. 4a-5a) that Congress could have employed different statutory language—*e.g.*, a rifle that "could have" a short barrel, rather than a rifle "having" a short barrel—if it had intended the Act to embrace rifles sold in a partially unassembled state. Although different statutory language might more clearly embrace unassembled rifles, that hardly demonstrates that Congress did not intend that result here. See *United States* v. *Drasen*, 845 F.2d at 733 (emphasis added):

> The statute *could have* defined a rifle as also including the parts thereof that could be readily assembled to form a functioning weapon. The omission of some clarifying language does not mean, however, that a reasonable interpretation of the statute does not yield the same result.

failing to comply with the registration and tax requirements of the Act. No such exception appears in the statute. See 26 U.S.C. 5841(b), 5845(a).

The comprehensive statutory scheme that Congress sought to erect would be rendered ineffective if manufacturers were allowed to circumvent the Act by the simple expedient of manufacturing and selling otherwise regulated firearms in a partially unassembled state. Requiring criminal prosecutions to depend upon the fortuity of recovering a cache of "fully assembled" weapons would similarly frustrate the important statutory purpose of discouraging trafficking in potentially dangerous firearms. Although the Thompson short-barrel rifle is not likely to be the weapon of choice of common street criminals, the holding in this case (that unassembled rifle parts do not come within the purview of the National Firearms Act) would logically apply equally to an Uzi (see *United States* v. *Combs*, 762 F.2d 1343 (9th Cir. 1985))[13] or other far more dangerous weapons.[14]

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[13] The court of appeals erred in relying (Pet. App. 16a-17a) on *United States* v. *Combs*, *supra*, for the proposition that the weapon must be fully assembled to constitute a "firearm." In that case, the defendant was found in possession of an Uzi carbine that already had a short barrel attached to it. 762 F.2d at 1345. No one has ever questioned that a firearm is "made" if a short barrel is already attached to the rifle. The question presented in this case, which the Ninth Circuit had no need to consider in *Combs*, is whether a pistol possessed together with a conversion kit that enables the pistol to be readily converted into a short-barrel rifle constitutes a "firearm," regardless of whether the parts have actually been assembled in that form.

[14] Respondent suggests that its Contender system is not as powerful as an Uzi and implies that it should therefore be judged by a different standard (Br. in Opp. 6). Respondent acknowledges (*id.* at 6-7 n.4), however, that Uzi makes a

Congress manifestly never intended the "nonsensical" result that only fully assembled weapons come within the purview of the Act. *United States* v. *Drasen*, 845 F.2d at 736.

2. The Treasury has consistently ruled that pistols with short barrels and "attachable" shoulder stocks are subject to regulation as short-barrel rifles under the National Firearms Act. See Rev. Rul. 61-45, 1961-1 C.B. 663; Rev. Rul. 61-203, 1961-2 C.B. 224. These rulings specifically determined that pistols with "conversion kits" similar to the Contender system are regulated under the Act. The rulings have been uniformly applied by the Treasury and have remained in effect at all times since their initial promulgation in 1961. This consistent administrative interpretation of the definitional terms of the Act by the agency responsible for its enforcement should be given substantial deference. See *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 476-477 (1979); *United States* v. *Correll*, 389 U.S. 299, 307 (1967).[15]

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carbine as well as a machinegun. If Uzi were to manufacture a "conversion" kit" to alter its carbine to a short-barrel rifle, it would be subject to the same regulatory framework as a "conversion kit" made by Thompson or any other manufacturer. Regulation under the National Firearms Act does not distinguish among rifles based upon their caliber or magazine size. The same standards apply to all rifles; they are regulated if they have short barrels. 26 U.S.C. 5845(a)(3).

[15] Deference is afforded to the Treasury's published interpretations of tax statutes because:

> "Congress has delegated to the * * * Commissioner [of Internal Revenue], not to the courts, the task of prescribing 'all needful rules and regulations for the enforce-

Respondent mistakenly asserts (Br. in Opp. 3, 13-18) that the agency has been inconsistent in its application of the statute to the Contender system. Respondent claims to be puzzled by the fact that the agency approved the *separate* marketing of a complete Contender pistol or a complete Contender rifle but determined that the *joint* marketing of the pistol with the conversion kit is subject to regulation. See *id.* at 3-4.

There is neither a puzzle in these rulings nor an inconsistency in the agency's analysis. A Contender pistol, when sold *by itself* without a rifle stock, is not a short-barrel rifle. A Contender rifle, when sold *by itself* without a short barrel, is not a short-barrel rifle. But a Contender pistol, when sold or held with a conversion kit that permits the pistol to be assembled as a short-barrel rifle in less than five minutes (see note 3, *supra*), *is* subject to regulation because it contains all the components of a short-barrel rifle in user-ready form. See *United States* v. *Drasen*, 845 F.2d 731, 736-737 (7th Cir.), cert. denied, 488 U.S. 909 (1988). See also *United States* v. *Endicott*, 803 F.2d at 508; *United States* v. *Luce*, 726 F.2d at

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ment' of the Internal Revenue Code. 26 U.S.C. § 7805 (a)." *United States* v. *Correll*, 389 U.S., at 307. That delegation helps ensure that in "this area of limitless factual variations," *ibid.*, like cases will be treated alike. It also helps guarantee that the rules will be written by "masters of the subject," *United States* v. *Moore*, 95 U.S. 760, 763 (1878), who will be responsible for putting the rules into effect.

National Muffler Dealers Ass'n v. *United States*, 440 U.S. at 477. In 1972, responsibility for administering and enforcing the provisions of the National Firearms Act was delegated within the Treasury Department to BATF. See 37 Fed. Reg. 11,896 (1972).

48-49; *United States* v. *Woods*, 560 F.2d at 665. The agency's rulings have consistently drawn and applied this very distinction for more than 30 years. See Rev. Rul. 61-45, *supra*; Rev. Rul. 61-203, *supra*. Because this consistent administrative interpretation reasonably implements the statute, it should be followed in this case. See *CFTC* v. *Schor*, 478 U.S. 833, 844 (1986); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

C. Other Provisions Of The National Firearms Act Are Consistent With And Do Not Alter This Conclusion

The court of appeals erred in concluding that the "common sense interpretation" (*United States* v. *Luce*, 726 F.2d at 49) that the other courts of appeals have reached—to include partially unassembled, but complete, weapons kits within the definition of "firearms" under the Act—would render other parts of the Act "either awkward or superfluous" (Pet. App. 6a).

1. The Act defines a "rifle" to "*include* any such weapon which may be readily restored to fire a fixed cartridge." 26 U.S.C. 5845(c) (emphasis added). The court of appeals reasoned that, if a firearm were deemed "made" without complete assembly, the additional statutory coverage of firearms that "may be readily restored" to use would then be superfluous (Pet. App. 6a-7a).

That reasoning is erroneous. A complete but partially unassembled weapon, such as the Contender with its conversion kit, is a "rifle" because, when fully assembled with the shoulder stock, it falls squarely within the definition of a rifle. A weapon that once was a rifle, but which now lacks some

essential component—such as a firing pin—is "*include*[*d*]" within the statutory definition of a "rifle" if it "may be readily restored" to use (26 U.S.C. 5845(c) (emphasis added)).[16] See *United States* v. *Smith*, 477 F.2d 399 (8th Cir. 1973) (per curiam) (even though the barrel was welded shut, it could be "readily restored" to use in eight hours); *United States* v. *Catanzaro*, 368 F. Supp. 450, 452 n.3, 453 (D. Conn. 1973) (weapon could be "readily restored" to use in approximately one hour).

The statutory inclusion of incomplete or non-functioning firearms that can be "readily restored" to use *supports* the conclusion that the statute also applies to complete, but partially unassembled, firearms kits. There is no reason to suppose that Congress would have intended to "include" weapons that require hours of reassembly within the definition of a "rifle" but exclude weapons that require "only a brief and minimal effort * * * to assemble" from the manufacturer's kit. *United States v. Endicott*, 803 F.2d at 508. As the Seventh Circuit concluded in rejecting this same argument, a "rifle that has been disas-

[16] In adding the "readily restored" language to the statute, "Congress specifically intended to overcome *United States* v. *Thompson*, 202 F. Supp. 503 (N.D. Cal. 1962), holding that a firearm with a missing firing pin was not a firearm under the Act." *United States* v. *Drasen*, 845 F.2d at 736 (citing S. Rep. No. 1501, 90th Cong., 2d Sess. 46 (1968)). The Senate Report states that the amendment was intended merely to "clarif[y]" the definition of the term "rifle" and was "consistent with the administrative construction of existing law." S. Rep. No. 1501, *supra*, at 46. The "administrative construction" of the statute to which the Senate Report refers included the Treasury Rulings that a short-barrel pistol held in conjunction with an attachable shoulder stock constitutes a short-barrel rifle under the Act. See Rev. Rul. 61-45, *supra*; Rev. Rul. 61-203, *supra*.

sembled for some reason is clearly in the same category as an identical collection of rifle parts that has not yet been assembled. The statute covers both." *United States* v. *Drasen*, 845 F.2d at 736.

2. In 1968, Congress amended the definition of "machinegun" in Section 5845(b) of the National Firearms Act to "include" the receiver of a machinegun by itself and any "combination of parts" from which a machinegun can be made or that can be used to convert another weapon into a machinegun. Gun Control Act of 1968, Pub. L. No. 90-618, § 201, 82 Stat. 1231. The court of appeals concluded (Pet. App. 12a-14a) that, by specifically including a "combination of parts" from which a machinegun can be assembled within the statutory definition of "machinegun" in 1968, Congress necessarily intended to *exclude* a "combination of parts" from which a short-barrel rifle can be assembled from the statutory definition of "rifle" under the Act.[17]

[17] The court also appeared to believe (Pet. App. 14a) that, since the statute expressly regulated a "combination of parts" for use in *converting* a non-regulated weapon into a "machinegun" or a "destructive device" (see 26 U.S.C. 5845(b) and (f)), it should not be read impliedly to regulate a "combination of parts" to convert a pistol into a short-barrel rifle (see 26 U.S.C. 5845(a)(3)). The question whether a "conversion kit" for converting a pistol into a short-barrel rifle is, by itself, subject to regulation is not presented in this case. Instead, this case presents the question whether the "conversion kit" *when possessed or distributed together with the pistol*—in a unit that constitutes a complete, partially unassembled short-barrel rifle—is regulated as a firearm under the Act. As the Seventh Circuit stated in *United States* v. *Drasen*, 845 F.2d at 737, "[w]e are concerned [in this case] only with complete parts kits for short-barrel rifles." With respect to a complete parts kit, the courts of appeals consistently have held heretofore that "[the statute] does not specify that the

The court of appeals' reasoning is based on a serious misreading of history. The Gun Control Act of 1968 was enacted in the wake of the assassinations of Martin Luther King, Jr. and Robert F. Kennedy. The Act represented a strong and swift political reaction to those events. The objective of the 1968 legislation was quite clearly to broaden, rather than narrow, the provisions of the National Firearms Act. The legislative findings in support of the Gun Control Act of 1968 recited:

> Handguns, rifles and shotguns have been the chosen means to execute three-quarters of a million people in the United States since 1900. The use of firearms in violent crimes continues to increase today. * * * No civilized society can ignore the malignancy which this senseless slaughter reflects.

H.R. Rep. No. 1577, 90th Cong., 2d Sess. 7 (1968). Congress noted its specific concern over the role played by rifles and shotguns in this "senseless slaughter" (*id.* at 8):

> Of the 6,500 firearms murders in the United States each year, 30 percent, or over 2,000, are committed with rifles or shotguns. * * * President Kennedy, Martin Luther King, Jr., Medgar Evers, and the 16 dead and 31 wounded victims of a deranged man firing from the tower of the University of Texas were all shot by rifles or shotguns.

It was against this background that Congress enacted the Gun Control Act of 1968 to "aid in curbing the

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parts must be assembled before [the statute] applies." *United States* v. *Woods*, 560 F.2d at 665. See also *United States* v. *Kokin*, 365 F.2d at 596.

problem of gun abuse that exists in the United States." S. Rep. No. 1501, 90th Cong., 2d Sess. 23 (1968). Congress succinctly described the revisions it enacted to the National Firearms Act of 1968 as "strengthening and clarifying amendments." *Id.* at 26.

One of the "strengthening and clarifying amendments" enacted in 1968 was the expansive definition of "machinegun" added in Section 5845(b) of the Act. This amendment codified the rationale of the decision in *United States* v. *Kokin*, 365 F.2d at 596, which previously had held that a complete parts kit that could be used to make a machinegun was subject to regulation under the National Firearms Act (*ibid.*). The amendment also went much further, however, and specified that a single part, such as a "receiver" or "frame" of a machinegun, or any part designed for converting a weapon into a machinegun, is subject to regulation under the Act. See 26 U.S.C. 5845(b); S. Rep. No. 1501, *supra*, at 45-46. See also note 17, *supra*.

It distorts history as well as logic to suggest that, by expanding the scope of the National Firearms Act and enlarging the scope of regulation for machineguns to "include" certain individual gun parts *as well as* conversion kits *and* complete parts kits used to make a "machinegun," [18] Congress meant to nar-

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[18] Congress evidently perceived "machineguns" to be so inherently dangerous that single constituent parts were made subject to regulation under the Act. As the Seventh Circuit stated in *United States* v. *Drasen*, 845 F.2d at 737:

> Parts for [weapons such as machine guns], which are regulated without limitation, are therefore parts with only one purpose, so that a single part could reasonably be subject to regulation.

row the definition of other sections of the Act to *exclude* from regulation an unassembled but complete parts kit that can be used to make a short-barrel "rifle." As all of the courts of appeals that had considered this question had correctly concluded prior to the decision in this case, the 1968 amendments to the National Firearms Act did not alter the "common sense" result that a complete parts kit that can be assembled in the form of a regulated weapon is subject to the Act. See *United States* v. *Drasen*, 845 F.2d at 737; *United States* v. *Luce*, 726 F.2d at 49 ("Congress clearly intended this common sense interpretation"); *United States* v. *Woods*, 560 F.2d at 665 (the statute "does not specify that the parts must be assembled before it applies"); *United States* v. *Endicott*, 803 F.2d at 509. See also Pet. App. 31a. As the court of appeals stated in *United States* v. *Woods*, "to reason otherwise would be to frustrate or defeat the very purpose of the statute." 560 F.2d at 665.

This conclusion is supported by history as well as by common sense. No one who lived through the events of that year could seriously contend that the Gun Control Act of 1968 was enacted "to frustrate or defeat" the regulation of short-barrel rifles and shotguns or in any other manner to *narrow* the preexisting, judicial or administrative construction of the National Firearms Act.[19] Cf. *Chisom* v. *Roemer*, 111 S.

[19] Indeed, one of the specific objectives of the 1968 amendments to the National Firearms Act was to alter the result in *Haynes* v. *United States*, 390 U.S. 85 (1968), which held that, under the Act as it then existed, the privilege against compelled self-incrimination would provide "a full defense to prosecutions either for failure to register a firearm * * * or for possession of an unregistered firearm" (*id.* at 100). Congress amended Section 5848 of the National Firearms Act to avoid this result by prohibiting the use of registration information against the person filing it "as evidence * * * in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing" of that information 26 U.S.C. 5848(a). See S. Rep. No. 1501, *supra*, at 26.

Ct. 2354, 2368 (1991) ("It is difficult to believe that Congress, in an express effort to broaden the protection afforded by the Voting Rights Act, withdrew, without comment, an important category of elections from that protection.").

Eighteen years after the Gun Control Act of 1968, Congress again amended the National Firearms Act, this time specifically to provide that the term "silencer" includes a "combination of parts" from which a silencer can be assembled. See 26 U.S.C. 5845(a)(7), 18 U.S.C. 921(a)(24). In expressly adding the "combination of parts" language to the definition of the term "silencer," Congress *explicitly* recognized that "complete kits" for firearm silencers *already were regulated* under the Act without that additional statutory language. See H.R. Rep. No. 495, 99th Cong., 2d Sess. 21 (1986). The stated purpose for the amendment to include a "combinations of parts" in the definition of "silencer" was "*to control the sale of incomplete silencer kits that now circumvent the prohibition on selling complete kits.*"[20] *Ibid.* (emphasis added).

[20] Consistent with the description of pre-1986 law set forth in the House Report, Edward Owen, Chief, Firearms Technology Branch of the BATF, testified in hearings held prior to the statutory amendments specifically defining the term firearm "silencer" to include silencer parts or combinations of silencer parts, that the BATF treated a "kit that [i]s complete enough to assemble a suppressor * * * in the same fashion as a functional device," and, hence, that a complete silencer "kit" was itself "a silencer subject to registration" under then-existing law. *Armor Piercing Ammunition and the Criminal Misuse and Availability of Machineguns and Silencers: Hear-*

Congress thus recognized, as the other courts of appeals consistently have held, that a "complete parts kit" (*United States* v. *Drasen*, 845 F.2d at 737) was subject to regulation under the Act even before the phrase "combination of parts" was added to bring "incomplete [parts] kits" for certain firearms also within the Act's coverage. See, *e.g.*, *United States* v. *Endicott*, 803 F.2d at 508 (a complete parts kit is regulated "if only a brief and a minimal effort is required to assemble the complete design by reason of the nature and location of the parts"); *United States* v. *Lauchli*, 371 F.2d at 311-313; *United States* v. *Kokin*, 365 F.2d at 596 (before the "combination of parts" language was added to the statutory definition of "machineguns," an unregulated carbine "together with all the parts necessary to convert it into * * * [a machine gun]" constituted a regulated "machinegun" under the Act). Prior to the decision in this case, the courts of appeals had uniformly held that a complete, but partially unassembled, weapon constitutes a "firearm" under the Act. See, *e.g.*, *United States* v. *Drasen*, 845 F.2d at 736-737; *United States* v. *Endicott*, 803 F.2d at 508; *United States* v. *Woods*, 560 F.2d at 665 (the statute "does not specify that the parts must be assembled before it applies"). They had thus consistently rejected the claim that "the statute did not cover unassembled rifles." *United States* v. *Drasen*, 845 F.2d at 735, 736-737 ("[c]ommon sense permits no other conclusion").

3. The decision of the court of appeals poses a serious threat to civil and criminal enforcement of

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ings on H.R. 641 and Related Bills Before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong., 2d Sess. 122, 132 (1984). See also *United States* v. *Luce*, *supra*; *United States* v. *Endicott*, *supra*.

the National Firearms Act. While the court of appeals apparently believed that this case merely presented the question of *who* pays the excise tax (the manufacturer or the purchaser who assembles the firearm) (Pet. 4a), the opinion drastically diminishes the breadth of the statute by requiring that a firearm be fully assembled to be subject to regulation (Pet. App. 5a). Since the same statutory definitions apply equally to the civil and criminal enforcement sections of the Act, the court of appeals' approach would enable defendants to claim that the government must now prove that the complete, but partially unassembled, weapon found in their possession had once been fully assembled in the form of a regulated firearm.[21] Manufacturers and importers of regulated firearms could also seek to circumvent the Act in like manner.[22]

In reaching its conclusion that a complete parts kit —which takes less than five minutes to assemble into a short-barrel rifle—is not a "firearm" under the Act, the court of appeals ignored this Court's admonition that the language of a statute should "not be distorted under the guise of construction, or so limited by construction as to defeat the manifest

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[21] As the cases cited in this brief reflect, prosecutions under the National Firearms Act often involve weapons that are recovered in a partially unassembled state. See *United States* v. *Drasen*, 845 F.2d at 736-737; *United States* v. *Endicott*, 803 F.2d at 508; *United States* v. *Luce*, 726 F.2d at 49; *United States* v. *Woods*, 560 F.2d at 665; *United States* v. *Kokin*, 365 F.2d at 596.

[22] The National Firearms Act prohibits the importation of regulated firearms for commercial sales. Importation is restricted to use for governmental agencies and scientific or research purposes. 26 U.S.C. 5844.

intent of Congress." *United States* v. *Alpers*, 338 U.S. 680, 681-682 (1950). While the Thompson short-barrel rifle is not itself a weapon of mass destruction, it would be simple enough to drive an Uzi through the eye of the Federal Circuit's needle. Congress never intended to allow a loophole in its regulatory structure that would be large enough for provisioning an army. See *United States* v. *Drasen*, 845 F.2d at 736.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner

v.

THOMPSON/CENTER ARMS COMPANY, A Division of the K.W. THOMPSON TOOL COMPANY, INC.,
Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the Contender single-shot pistol and carbine kit, which are intended to be made only as a pistol with a 10″ barrel and as a rifle with a 21″ barrel, nonetheless constitute a rifle having a barrel of less than 16″ in length under the Internal Revenue Code, 26 U.S.C. § 5845(a)(3), even though the United States concedes that use of two receivers would remove these parts from such taxation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. THE DEFINITIONS OF "RIFLE" AND OTHER TERMS PRECLUDE CLASSIFICATION OF THE CONTENDER PISTOL AND CARBINE KIT AS AN NFA FIREARM	6
A. The Narrow Definition of "Rifle" Contrasted with Broader NFA Definitions	6
B. The Government Would Expand The Definition to Include A Product Capable Of Being Made Into A Taxable Rifle	15
II. AN AMBIGUITY IN A TAXING STATUTE WITH SEVERE CRIMINAL PENALTIES MUST BE CONSTRUED IN FAVOR OF THE TAXPAYER	21
III. THE CIRCUITS ARE NOT IN CONFLICT	30
A. No Other Reported Cases Concern a Pistol and Carbine Kit	30
B. *Drasen* Does Not Apply to the Products at Issue and is Based on a Revoked Revenue Ruling	33
CONCLUSION	39

TABLE OF AUTHORITIES

CASES

	Page
Auto-Ordnance Corp. v. *United States*, 822 F.2d 1566 (Fed. Cir. 1987)	22
Chevron U.S.A. v. *National Resources Defense Council*, 467 U.S. 837 (1984)	25
Comm'r v. *First Security Bank of Utah*, 405 U.S. 394 (1972)	24
Commissioner v. *Acker*, 361 U.S. 87 (1959)	23
Commissioner v. *Engle*, 464 U.S. 206 (1984)	23
Commissioner v. *Newman*, 159 F.2d 848 (CA2 1947)	25
Crandon v. *United States*, 110 S.Ct. 997, 108 L.Ed. 2d 132 (1990)	26
Davis v. *Erdmann*, 607 F.2d 917 (10th Cir. 1979)	25
Federal Communications Commission v. *American Broadcasting Co.*, 347 U.S. 284 (1954)	26
Gould v. *Gould*, 245 U.S. 151 (1917)	21
Hanover Bank v. *Commissioner*, 369 U.S. 672 (1962)	24
Haynes v. *United States*, 390 U.S. 85 (1968)	19, 22
Hoffman Estates v. *Flipside*, 455 U.S. 489 (1982)	11
Martin v. *Harrington & Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984)	36
Mavilia v. *Stoeger Industries*, 574 F. Supp. 107 (D. Mass. 1983)	15
Rice v. *Rehner*, 463 U.S. 713 (1983)	27
Russello v. *United States*, 464 U.S. 16 (1983)	23
Sonzinsky v. *United States*, 300 U.S. 506 (1937)	21-22
Tandy Leather Co. v. *United States*, 347 F.2d 693 (5th Cir. 1965)	22
Thompson/Center Arms Co. v. *Baker*, 686 F. Supp. 38 (D.N.H. 1988)	22
TVA v. *Hill*, 437 U.S. 153 (1978)	17
United States v. *Anderson*, 885 F.2d 1248 (5th Cir. 1989)	19
United States v. *Bass*, 404 U.S. 336 (1971)	23
United States v. *Biswell*, 406 U.S. 311 (1972)	19
United States v. *Bradley*, 892 F.2d 634 (7th Cir. 1990)	35

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Brady*, 710 F. Supp. 290 (D. Colo. 1989)	25
United States v. *Catanzaro*, 368 F. Supp. 450 (D. Conn. 1973)	32
United States v. *Combs*, 762 F.2d 1343 (9th Cir. 1985)	32
United States v. *Correll*, 389 U.S. 299 (1967)	26
United States v. *Cosey*, 244 F. Supp. 100 (E.D. La. 1965)	18
United States v. *Drasen*, 665 F. Supp. 598 (N.D. Ill. 1987), *rev'd* 845 F.2d 731 (7th Cir. 1988), *cert. denied* 488 U.S. 909 (1988)	4, 6, 24, 33-39
United States v. *Endicott*, 803 F.2d 506 (9th Cir. 1986)	31
United States v. *Freed*, 401 U.S. 601 (1971)	20
United States v. *Green*, 515 F. Supp. 517 (D.Md. 1981)	25
United States v. *Kokin*, 365 F.2d 595 (3rd Cir. 1966)	30
United States v. *Lauchli*, 371 F.2d 303 (7th Cir. 1966)	30, 37
United States v. *Luce*, 726 F.2d 47 (1st Cir. 1984)	31
United States v. *Posnjak*, 457 F.2d 1110 (2nd Cir. 1972)	19
United States v. *Rose*, 695 F.2d 1356 (10th Cir. 1982), *cert. denied* 464 U.S. 836 (1983)	14
United States v. *Seven Miscellaneous Firearms*, 503 F. Supp. 565 (D.D.C. 1980)	8, 25
United States v. *Smith*, 477 F.2d 399 (8th Cir. 1973)	32
United States v. *Tankersley*, 492 F.2d 962 (7th Cir. 1974)	36
United States v. *Woods*, 560 F.2d 660 (5th Cir. 1977), *cert. denied* 435 U.S. 906 (1978)	32
United States v. *Zeidman*, 444 F.2d 1051 (7th Cir. 1971)	33
White v. *Aronson*, 302 U.S. 16, 20 (1937)	22

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

	Page
Firearms Owner's Protection Act, P.L. 99-308, 100 Stat. 451 (May 19, 1986)	34
P.L. 353, 66 Stat. 87 (May 21, 1952)	9
P.L. 83-591, 68A Stat. 3 (1954)	8
P.L. 99-408, 100 Stat. 920 (Aug. 28, 1986)	12
18 U.S.C. § 921(a)(3), (16)	32
18 U.S.C. § 921(a)(17)(B)	12
18 U.S.C. § 921(a)(24)	12, 31
18 U.S.C. § 922(r)	12
18 U.S.C. § 925(d)(3)	14
26 U.S.C. § 5821	15
26 U.S.C. § 5822	15
26 U.S.C. § 5845(a)	2, 3, 6, 7, 14, 21
26 U.S.C. § 5845(a)(1)	32, 36
26 U.S.C. § 5845(a)(3)	*passim*
26 U.S.C. § 5845(a)(4)	7
26 U.S.C. § 5845(a)(5)	32
26 U.S.C. § 5845(a)(7)	12, 31
26 U.S.C. § 5845(b)	10, 13, 35
26 U.S.C. § 5845(c)	*passim*
26 U.S.C. § 5845(d)	32, 36
26 U.S.C. § 5845(e)	32
26 U.S.C. § 5845(f)	10, 11, 13
26 U.S.C. § 5845(i)	*passim*
26 U.S.C. § 5861	15, 26
26 U.S.C. § 5871	15
26 C.F.R. § 179.29 (1955)	27
27 C.F.R. § 179.11	6, 39

OTHER AUTHORITIES

	Page
ATF Ruling 83-5, ATFB 1983-3, 35	8
CONG.REC.	9, 35
Glossary of the Association of Firearm and Toolmark Examiners (1985)	28
Gun Control Act of 1968, Senate Report (Judiciary Committee) No. 1501, Sept. 6, 1968 [to accompany S.3633]	10
Holmes, Oliver Wendell, *Collected Legal Papers* (1952)	15

TABLE OF AUTHORITIES—Continued

	Page
H.R. Rept. No. 495, 99th Cong., 2d Sess. (1986)	30
H.R. Rept. 1337, 83d Cong., 2d Sess., *reprinted in* 1954 U.S. Code Cong. & Admin. News 4019	8
H.R. Rept. 1714, 82nd Cong., 2d Sess., *reprinted in* 1952 U.S. Code & Admin. News 1454	9
Rev. Rul. 54-606, 1954-2 C.B. 33	4-5, 37-39
Rev. Rul. 56-296, 1956-1 C.B. 553	28
Rev. Rul. 59-340, 1959-2 C.B. 375	28
Rev. Rul. 61-45, 1961-1 C.B. 663	28-29
Rev. Rul. 61-203, 1961-2 C.B. 224	29
Rev. Rul. 70-517, 1970-2 C.B. 327	29
Rev. Rul. 72-178, 1972-1 C.B. 423	5, 38-39

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No. 91-164

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THOMPSON/CENTER ARMS COMPANY, A Division of the K.W. THOMPSON TOOL COMPANY, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

The Contender sporting pistol has been made by Thompson/Center Arms since 1967. This large, unconcealable pistol with a 10" barrel is a single shot, requiring each cartridge to be loaded and unloaded by hand before another shot can be fired. Out of 400,000 Contender pistols manufactured, the company is unaware of a single person ever using a Contender in a crime. The pistol has taken top honors as the leading pistol for hunting and target competition. (Pet. App. 2a; C.A. App. 56-57.)

The Thompson/Center carbine kit consists of a 21" barrel, a wooden foreend to hold the barrel in place, and a shoulder stock. Removal of the 10" pistol barrel, foreend, and hand grip allows use of the pistol frame or re-

ceiver (the part which holds internal parts and to which the barrel and stock attach) to be assembled with the carbine kit parts to make a carbine (a type of rifle).[1] A hammer, punch, hex wrench, and screwdrivers are required. The following conspicuous warning is molded on the carbine shoulder stock: "WARNING. FEDERAL LAW PROHIBITS USE WITH BARREL LESS THAN 16 INCHES." More detailed warnings to avoid violation of the National Firearms Act ("NFA") are included in the kit instructions. (Pet. App. 2a.)

Sportsmen, who would provide the only market for the Contender pistol and carbine kit, have no incentive to make a rifle with a barrel less than 16". The sportsmen who would use this product are generally law-abiding, and the 10" pistol barrel used with a shoulder stock would have no utility. (C.A. App. 63.)

Nor would criminals have any motive to make a rifle with a barrel under 16" from the Contender pistol and carbine kit. A Contender with a 10" barrel and a huge shoulder stock is even less concealable than a Contender pistol. No criminal demand for single shot firearms exists.[2] (C.A. App. 47.)

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[1] Pictures of the Contender pistol and carbine kit, assembled as a pistol and as carbine, may be seen at Pl. Ex. 5, App. to Mot. of Pl. for Sum. J., A101. The buttstock with warnings, a complete pistol, a complete carbine, and a receiver, are all pictured on *id.* at A102. A videotape of how a pistol and carbine are assembled was filed and referenced at A161(2). Members of the Court are urged to view the videotape. A catalog with the Contender items is found in *id.* at A113.

[2] Indeed, the Bureau of Alcohol, Tobacco, and Firearms ("BATF") has removed large numbers of semiautomatic pistols with instantly attachable shoulder stocks, and rifles with barrels less than 16", from the National Firearms Act. Almost all items on BATF's curio and relic list are short-barrel rifles removed from the NFA because they are "not likely to be used as a weapon." 26 U.S.C. Section 5845(a) (last sentence); C.A. App. 48-49.

A retired BATF expert examined a complete Contender pistol and a complete Contender carbine. It took him over 10 minutes to remove and assemble parts on these guns in such a way as to simulate the time it would take to convert a pistol into a carbine using a carbine kit. (C.A. App. 48.)

Any rifle or shotgun barrel is capable of being readily made into a short-barrel NFA firearm with a hacksaw. A 21" Contender carbine barrel can be cut off in 25 seconds with a common hacksaw. (C.A. App. 103-104.) Moreover, a complete Contender pistol and a complete Contender carbine are capable of having parts exchanged to make an NFA firearm, but BATF concedes that these items do not constitute a short barrel rifle. (Pet. App. 3a, 21a.)

In 1971, Rex D. Davis, the BATF Director, wrote to Thompson/Center as follows:

> You asked if it would be legal to utilize the receiver of the Contender pistol in making up a single shot carbine with a barrel 18 inches long and with a full shoulder stock.
>
> You are advised that the manufacture of a carbine such as you describe, by utilizing a pistol action, would be legal and the firearm so produced would not come within the purview of the National Firearms Act . . . .
>
> In view of the interchangeable barrel capabilities of your Contender action, we believe that it would be in the public interest for you to include a cautionary statement with each firearm. This statement would serve to advise the purchaser that any reduction of the barrel length of the carbine barrel with one of your pistol barrels or otherwise, or the reduction of the overall length of the weapon to less than 26 inches would constitute the making of a firearm within the purview of Section 5845(a) of the National Firearms Act. (C.A. App. 31-32.)

In 1973, BATF addressed the "Sportsman's Kit," consisting of a pistol with interchangeable 16" and 4" barrels and a shoulder stock. The BATF Assistant Director determined that the items are not an NFA firearm, and recommended that the manufacturer provide warnings not to attach the shoulder stock to the gun when the 4" barrel is installed. (C.A. App. 34).

In 1976, BATF opined to the producer of "Texas Contender Firearms" that "Contender Carbine Conversion Kits" are not regulated. "However, the *attaching* of a shoulder stock to a handgun with a barrel of 16 inches or less subjects that fiream" to the NFA. (C.A. App. 35-37.)

In 1983, BATF advised that if a shoulder stock "is *attached* to a pistol or a revolver having a barrel length of less than 16 inches the resultant combination would be classified as a firearm" under the NFA, and recommended a warning to purchasers that payment of the NFA making tax is required "prior to assembling the combination." (C.A. App. 38.) In 1985, BATF again advised that certain combinations of parts of pistols and rifles are not considered NFA firearms unless assembled or intended to be assembled as such. (C.A. App. 40-41.)

The above rulings were disregarded by a subordinate employee who wrote a letter in 1985 claiming that the Contender pistol and carbine kit just introduced by Thompson/Center Arms was a short barrel rifle under the NFA, even though not asesmbled as such. (C.A. App. 26-27.) This litigation followed.

In the Claims Court, the government strongly relied on Rev. Rul. 54-606, 1954-2 C.B. 33, repeatedly assuring the court that it had never been modified or revoked. *E.g.*, Memo. in Opp. to Pl. Mot. for Sum. J. at 4. The court relied on the ruling and on *United States* v. *Drasen*, 845 F.2d 731 (7th Cir. 1988), which in turn relied on the ruling. (Pet. App. 28a.) Neither court was aware that Rev.

Rul. 54-606 was revoked shortly after Congress enacted the specific definitions in Title II of the Gun Control Act of 1968. Rev. Rul. 72-178, 1972-1 C.B. 423-24.

The Court of Appeals held that the Contender pistol and carbine kit is not a rifle having a barrel less than 16" in length because it has not been "made" into such a weapon and is not "intended to be fired from the shoulder" with a short barrel. (Pet. App. 4a-6a.) The court noted that some NFA firearms, excluding a rifle, are defined in terms of a combination of parts from which a complete firearm can be assembled (in some cases, if intent is present).[3] (Pet. App. 7a-8a.)

SUMMARY OF ARGUMENT

The definitions and legislative history of "rifle" and other relevant terms preclude classification of the Contender pistol and carbine kit as an NFA firearm. "Rifle" is defined as an actual "weapon" that is "made" and "intended to be fired from the shoulder," or is readily restorable, and thus parts intended to be assembled only as a pistol and a long barrel rifle do not constitute a short barrel rifle. By contrast, the NFA broadly defines "machinegun" as a combination of parts, and "destructive device" and "silencer" as combinations of parts plus intent. When Congress intended to define a type of rifle as including a combination of parts, it did so, and even then only if intent is present.

The definitions at issue must be construed in favor of Thompson/Center. In cast of doubt, definitions in a revenue statute with severe criminal penalties and no willfulness element must be construed in favor of the taxpayer and against the United States. Further, the defini-

[3] Contrary to the government (Br. 5), the Court of Appeals was not concerned with combinations of parts to convert a weapon into an NFA firearm, but instead was concerned with contrasting definitions of NFA firearms that included all necessary parts to assemble a complete weapon.

tion of "rifle" must be considered in light of other NFA definitions, which include "combination-of-parts" with or without intent. The agency's official interpretation just after enactment of the statute is entitled to more weight than a contrary position invented by a subordinate employee years later.

This is a case of first impression. No previous decision of any court holds that a pistol and carbine kit constitute a short barrel rifle. While inapplicable to the facts here, *United States* v. *Drasen*, 845 F.2d 731 (7th Cir. 1988) was based on a revenue ruling revoked by the Treasury Department twenty years ago. The Court of Appeals correctly applied the law to the facts here.

ARGUMENT

I. THE DEFINITIONS OF "RIFLE" AND OTHER TERMS PRECLUDE CLASSIFICATION OF THE CONTENDER PISTOL AND CARBINE KIT AS AN NFA FIREARM

A. The Narrow Definition of "Rifle" Contrasted with Broader NFA Definitions

The Contender pistol and carbine kit is intended for use as a pistol with a 10" barrel and a rifle with a 21" barrel. Neither of these guns or their parts are "firearms" as technically defined in 26 U.S.C. § 5845(a).

Mere ability to convert a gun into an NFA firearm does not make the gun an NFA firearm. Otherwise, all long barrel rifles would be short barrel rifles, merely because the barrels can be sawed off in seconds. Indeed, BATF concedes that possession of a Contender pistol and a carbine (each with its own separate receiver)[4] does not constitute possession of a short barrel rifle unless assembled as such. (Pet. App. 3a, 21a.)

[4] The receiver is the housing to which the barrel, stock, and internal parts attach. See 27 C.F.R. § 179.11 ("frame or receiver").

The purpose of the carbine kit is to make a rifle a 21" barrel, not, as the government states in its version of the Question Presented, to "allow the pistols readily to be converted into rifles with 10-inch barrels."[5] That is like saying that Thompson/Center manufactures rifles with 21" barrels that "allow" the barrels readily to be sawed off, or that "allow" persons readily to murder other persons.

26 U.S.C. § 5845(a) defines "firearm" to include "(3) a rifle *having* a barrel or barrels of less than 16 inches in length; (4) a weapon *made* from a rifle if such weapon *as modified* has an overall length of less than 26 inches or a barrel or barrel of less than 16 inches in length." (emphasis added). The Court of Appeals determined that the Contender pistol and carbine kit is not a "firearm" or a short barrel rifle under either definition. (Pet. App. 4a-5a.) As its version of the Question Presented reflects, the government does not disagree with the court's determination that § 5845(a)(4) does not apply here.[6]

The definition of "rifle" in 26 U.S.C. § 5845(c) is as follows: "The term 'rifle' means a *weapon* designed or redesigned, *made or remade*, and *intended* to be fired

[5] Also in the Question Presented the government incorrectly asserts that Thompson/Center "manufactures" conversion kits. Kits were manufactured only for a brief period in 1985. Only one pistol and carbine kit were possessed as a unit in connection with the payment of the $200 tax and the claim for a refund. C.A. App. 129.

[6] Count 1 of the Complaint alleged that the Contender pistol and carbine kit is not a firearm in the meaning of 26 U.S.C. § 5845(a)(3). Count 2 of the Complaint alleges that use of a Contender pistol receiver to make a carbine, and then use of the same receiver to remake the pistol, does not constitute making a weapon from a rifle in the meaning of 26 U.S.C. § 5845(a)(4). Count 3 alleges that the pistol and carbine kit is not otherwise a "firearm" as defined in § 5845(a). Since the United States conceded that the items were not encompassed under these definitions, other than § 5845(a)(3) (Mot. of the U.S. for Sum. J. & Brief at 17), the Claims Court concluded that "counts two and three of the complaint are not issues in this case." (Pet. App. 22a.)

from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be *readily restored* to fire a fixed cartridge." Other than the "readily restored" clause which was added in 1968, this definition was adopted in 1954 [7] to narrow the scope of rifles being interpreted as subject to the NFA.[8]

A Contender pistol and carbine kit fit neither of the two definitions of "rifle" having a barrel less than 16 inches. Mere parts never assembled as such neither constitute a "weapon" that is "made" and "intended to be fired from the shoulder," nor are they "restorable" to something they have never been.[9]

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[7] P.L. 83-591, 68A Stat. 3, 726 (1954). A further clarifying amendment was made in 1958. Pet. App. 9a.

[8] As stated in H.R. Rept. 1337, 83d Cong., 2d Sess. 524, *reprinted in* 1954 U.S. Code Cong. & Admin. News 4019, 4542, "rifle" and two other terms needed defining because:

> Many weapons firing projectiles by the action of an explosive have been brought within the scope of the National Firearms Act although it is believed the Congress did not intend that such weapons should be included. . . . It is felt that these restrictions should be removed in pursuance of the clearly indicated congressional intent to cover under the National Firearms Act only such modern and lethal weapons, except pistols and revolvers, as could be used readily and efficiently by criminals or gangsters. Moreover, for proper administration of the National Firearms Act it is considered highly proper and desirable that the Congress define the terms "rifle," "shotgun", and "any other weapon" so as to remove any doubt as to the type of firearms which Congress intended to bring within the scope of the National Firearms Act.

[9] "The 'readily restorable' definition defines *weapons which previously could shoot* . . . but will not in their present condition." ATF Ruling 83-5, ATFB 1983-3, 35. "The term which Congress saw fit to use in the statute, 'restorable', is defined by Webster 'to bring back to a former or normal condition, as by repairing. . . .'" *United States* v. *Seven Miscellaneous Firearms*, 503 F.Supp. 565, 574 (D.D.C. 1980).

The NFA also includes the following definition: "The term 'make' and the various derivatives of such word, shall include manufacturing . . ., *putting together*, altering, any combination of these, or otherwise producing a firearm." [10] 26 U.S.C. § 5845(i). Thus, "the term rifle means a weapon . . . *made or remade*" (§ 5845[c]), and "the term 'make' . . . shall include . . . *putting together*" (§ 5845[i]). The definition of "make" as "putting together" would have no meaning if a mere combination of parts which had never been put together as such constituted "a rifle *having* a barrel or barrels of less than 16 inches in length" as used in § 5845(a)(3).

By contrast, three types of NFA firearms—machineguns, destructive devices (including rifles over .50 caliber), and silencers—are defined in terms of combinations of parts, and thus are "made" even before being "put together." These firearms are "made" when a combination of parts from which such firearms may be assembled are "manufacture[ed] . . . or otherwise produc[ed]" (§ 5845[i]), subject to, in the case of silencers and rifles over .50 caliber, certain intent and/or design requirements.

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[10] This was originally adopted in 1952 and slightly reworded in 1968 to its present form. *See* P.L. 353, 66 Stat. 87 (May 21, 1952). "The purposes of the bill is to bring the *act of making* sawed-off shotguns and rifles, or otherwise *transforming* a weapon into a firearm. . . ." H.R. Rept. 1714, 82nd Cong., 2d Sess., *reprinted in* 1952 U.S. Code Cong. & Admin. News 1454 (emphasis added). The report noted that short barrel guns become available "by the comparatively simple device of purchasing standard shotguns from legitimate dealers and then sawing off the barrels. . . ." *Id.* at 1455. The solution was not to require the manufacturer to make a barrel incapable of being sawed off, but to punish "the action of sawing off the barrel or otherwise *making* such firearm" without first paying the tax and registering the gun. *Id.* at 1456. (emphasis added).

On the House floor, Congressman Jenkins "assure[d] the sportsmen and hunters and those dealing in guns and firearms that this does not invade the sportsmen at all." 98 CONG. REC. 3616 (Apr. 7, 1952).

The 1968 Act broadened the definition of machinegun to include all parts necessary to make a machinegun. 26 U.S.C. § 5845(b) provides: "The term 'machinegun' means . . . *any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.*" No such definition exists for rifle. However, like rifle, machinegun is also defined in terms of "any weapon which shoots . . . or can be readily restored to shoot". Obviously, the "weapon" and "restorable" definitions do not reach a combination of parts from which a weapon could be, but never has been, assembled.

A machinegun did not include a mere combination of parts before that explicit definition was adopted in 1968. An analysis by the Judiciary Committee of the new definition stated:

> It provides three new categories as included within the term "machinegun": . . . (3) any combination of parts from which a machinegun can be assembled if such parts are in the possession of a person. *This is an important addition to the definition of "machinegun"* and is intended to overcome problems encountered in the administration and enforcement of existing law. Gun Control Act of 1968, Senate Report (Judiciary Committee) No. 1501, Sept. 6, 1968 [to accompany S. 3633], at 45-46. (Emphasis added.)

The above analysis also discussed the addition of the "readily restorable" language to the definitions of rifle and shotgun as intending to encompass a gun without a firing pin. *Id.*

The 1968 Act broadly defined a "destructive device" in § 5845(f) in part as follows:

> . . . (2) any type of weapon by whatever name known which will, or which may be *readily converted* to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun . . .; and (3) *any combination of parts either designed or intended* for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and *from which a destructive device may be readily assembled.* The term "destructive device" shall not include any . . . rifle which the owner intends to use solely for sporting purposes. (Emphasis added.)

The above was intended to include large bore military rifles without sporting uses, and combinations of parts intended to be assembled as such. The NFA definitions of both "rifle" and "destructive device" include fully made (assembled) weapons. However, while a "rifle" (including a short-barrel rifle) includes "any such weapon which may be *readily restored* to fire a fixed cartridge," a rifle with a bore of more than one-half inch in diameter is a destructive device if it "may be *readily converted* to expel a projectile". The broader "readily converted" language does not require that a device have previously been a destructive device. The "readily-converted" definition could not practically apply to "rifle," since every rifle is readily convertible to a short barrel rifle by use of a hacksaw.

Neither definition includes a mere combination of parts from which a short barrel rifle or rifle with bore over one half inch can be assembled. Only the latter includes "any combination of parts either *designed or intended* for use in converting any device into a destructive device . . . *and* from which a destructive device may be readily assembled."[11] § 5845(f)(3).

In the Firearms Owners' Protection Act of 1986, Congress revisited and had ample opportunity to expand the

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[11] While "intended" normally refers to the intent of the person in possession, "design" refers to the intent of the manufacturer and the predominant use of a product. A product merely capable of illegal use is not "designed" for the illegal use. Thus, "items which are principally used for nondrug purposes, such as ordinary pipes, are not 'designed for use' with illegal drugs." *Hoffman Estates* v. *Flipside*, 455 U.S. 489, 501 (1982).

definition of particular firearms by addition of "combination of parts" language such as already existed for machineguns and destructive devices. It did enact similar language in reference to silencers,[12] but did not do so in reference to the term "rifle." 26 U.S.C. § 5845(a)(7), incorporating 18 U.S.C. § 921(a)(24), provides: "The terms 'firearm silencer' and 'firearm muffler' mean any device for silencing, muffling, or diminishing the report of a portable firearm, *including any combination of parts*, designed or redesigned, and *intended for use in assembling or fabricating* a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication." This precludes any interpretation that a mere combination of parts, without intent, is a silencer.

By such enactments,[13] Congress has again clearly expressed its intent that a combination-of-parts definition does not apply to rifles, and that even where it applies to certain NFA firearms, an intent requirement may exist.[14]

BATF concedes that a combination-of-parts theory does not apply to possession of a complete pistol and a complete carbine, but illogically argues such theory if only one receiver is present, even though the pistol and carbine kit are expressly not intended to be assembled as a short barrel rifle. Nothing in the NFA justifies this expansion of the statute.

The government distorts the Court of Appeals' discussion of contrasting "combination-of-parts" definitions. The Court was concerned with the definitions of machinegun, destructive device, and silencer as including a complete combination of parts from which such weapons could be assembled (with various intent standards), and the lack of any such definition of rifle. Pet. App. 7a-8a. Yet the government misreads the court as being concerned with a combination of parts to *convert* a weapon into a rifle.[15] Br. 19. The court did not remotely suggest, as does the government, that this case concerns whether a conversion kit alone is regulated by the NFA.

The government claims that the Court of Appeals concluded that a "firearm"—by implication, any NFA "firearm"—is not "made" until assembled. Br. 10-11, 25. Yet the court acknowledged the varied definitions of "firearm" in the NFA, which defines certain weapons as being made when a complete combination of unassembled

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[12] Moreover, in connection with a new provision in 18 U.S.C. § 921(a)(17)(B) concerning certain ammunition, the following definition was enacted: " 'handgun' means any firearm including a pistol or revolver designed to be fired by the use of a single hand. *The term also includes any combination of parts from which a handgun can be assembled.*" P.L. 99-408, § 10, 100 Stat. 920 (Aug. 28, 1986) (emphasis added).

[13] In the Crime Control Act of 1990, Congress amended the Gun Control Act to provide that "it shall be unlawful for any person to *assemble from imported parts any semiautomatic rifle* or any shotgun" which has not been approved for importation. 18 U.S.C. § 922(r). In other words, a "rifle" does not exist until it is "assemble[d]" from "parts" (in this case, "imported parts").

[14] The definitions of "destructive device" and "firearm silencer" both require that the combinations of parts be designed and/or intended to be assembled as such. Only "machinegun" does not include the intent requirement. "Rifle" has no combination of parts definition, with or without intent.

[15] For the first time, the government is interjecting the irrelevant definition of machinegun as including "any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun. . . ." 26 U.S.C. § 5845(b). Only the next phrase of that subsection is relevant here—"any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person."

Contrary to the government, destructive device is not defined to include a mere conversion kit. Br. 19 n.17. Rather, 26 U.S.C. § 5845(f)(3) requires that all the parts to assemble a complete destructive device must be present: "any combination of parts either designed or intended for use in converting any device into a destructive device . . . *and from which a destructive device may be readily assembled.*"

parts is possessed, but does not so define rifles. (Pet. App. 6a.) The court's opinion is not a serious threat to the enforcement of the NFA because it does *not* require that just *any* NFA "firearm" be assembled. The court ruled that a pistol and carbine kit which will never be assembled as a short barrel rifle, is not such a rifle. The opinion does not address other NFA "firearms" except to acknowledge that some types (such as machinegun) need not be assembled.

The government contradictorily asserts that sporting or criminal use in defining a weapon is irrelevant, but that the court's opinion will allow weapons of mass destruction. Br. 14, 26. It raises the bogeyman word "Uzi," failing to note that normally that term refers to a machinegun and thus is subject to a combination of parts definitions.[16] Generally, a short barrel rifle is less likely to be used in crime than any other type of firearm, including a long barrel rifle. (C.A. App. 47-48; Pl. Ex. 2, App. to Mot. for Sum. J., A58.) BATF has removed numerous short barrel rifles, including semiautomatics, from the NFA because they are not likely to be used as weapons.[17] Under these circumstances, the Court of Appeals' opinion—that items that will never be made into a short barrel rifle do not constitute a short barrel rifle—will not cause the sky to fall.

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[16] A cosmetically-similar semiautomatic model Uzi is imported into the United States only because BATF found it to be particularly suitable for sporting purposes. 18 U.S.C. § 925(d)(3); *United States* v. *Rose*, 695 F.2d 1356, 1357 (10th Cir. 1982), *cert. denied*, 464 U.S. 836 (1983). As in the case at bar, "the carton, the instructions, and the firearm itself contained warnings that modification of the firearm was unlawful." *Id.* No one would suggest that the importer was responsible for the owner quickly and easily sawing off the barrel in that case.

[17] *See* 26 U.S.C. § 5845(a) (last sentence).

B. The Government Would Expand The Definition to Include A Product Capable Of Being Made Into A Taxable Rifle

Any conventional rifle can be made into an NFA firearm in a few seconds by sawing off the barrel. The government argues that mere capability of being made into an NFA firearm causes the Contender pistol and carbine kit to be an NFA firearm.

The government assumes that there is nothing to prevent a consumer from attaching the shoulder stock to the pistol.[18] Imprisonment of ten years and a $10,000 fine seems adequate incentive to encourage consumers to obtain the Secretary's permission and pay a $200 tax before making a short barrel rifle. 26 U.S.C. §§ 5821, 5822, 5861(c), (f), 5871. The government could also argue that there is nothing to prevent a dealer from selling Contender pistols and not paying income tax on the profits. Yet Thompson/Center is no more responsible for some one else's failure to pay a tax than it would be responsible for a murder committed with a Contender pistol and carbine kit.[19]

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[18] At bottom, the government seems to be arguing that Thompson/Center must make a firearm physically incapable of violating the law—the tax law, that is, not the laws against murder. Yet a barrel incapable of being sawed off is incapable of being manufactured. Nothing in the statute requires the company to make a firearm incapable of being assembled into a short barrel rifle without first obtaining the Secretary's permission.

[19] The courts have uniformly held firearms manufacturers not liable in tort suits where a criminal misused a firearm. One such case, *Marilia* v. *Stoeger Industries*, 574 F. Supp. 107, 110 n.3 (D. Mass. 1983) noted:

> Oliver Wendell Holmes, in his *Collected Legal Papers*, 131-132 (1952) explained his theory against holding the manufacturers and sellers of guns liable as follows:
>
> > If notice so determined is the general ground for liability, why is not a man who sells firearms answerable for as-

In a *post hoc* litigation argument suggested for the first time now, the government argues that BATF only conceded that "the separate marketing" of a complete pistol and a complete carbine does not fall within the NFA. (Br. 3 n.4, 16.) To the contrary, BATF advised: "The possession of a complete rifle and a complete pistol is not within the scope of the NFA unless components of the weapons are actually assembled as a firearm, such as a short-barreled rifle, that is covered by the NFA." (C.A. App. 100, 43; Pet. App. 3a, 21a.)

At oral argument, counsel showed the Claims Court a complete pistol and a complete carbine—each with its own separate receiver—and illustrated with various tools how the barrels, foreends, shoulder stock, and grip are removed and assembled. (C.A. App. 107-109). The government uses this demonstration to argue that a pistol and carbine *kit* may be used to "create" an NFA firearm. (Br. 3 n.3.) In fact, it showed that a complete pistol and a complete carbine—which is concededly not an NFA firearm—can be used to make such a firearm.

This demonstrates the absurdity of BATF's "one receiver" theory. If the pistol and carbine kit use the same receiver, a short barrel rifle allegedy exists, even though one is never created. If two receivers are present—one for the pistol and one for the carbine—a short barrel rifle

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> saults committed with pistols bought of him, since he must be taken to know the probability that, sooner or later, someone will buy a pistol of him for some unlawful end? . . . The principle seems to be pretty well established . . . that everyone has a right to rely upon his fellow-men acting lawfully, and, therefore, is not answerable for himself acting upon the assumption that they will do so, however improbable it may be.

Similarly, Thompson/Center is entitled to rely on purchasers of a pistol and carbine kit acting lawfully.

admittedly does not exist. Nothing in the statute sanctions this contradictory result.[20]

The NFA defines some firearms as combinations of parts (machineguns), others as combinations of parts with intent (destructive devices, silencers), and still others without any such definition (rifles). The government ignores these differences and claims that rifles are implicitly defined the same as machineguns.

"Rifle" means a "weapon" that has been "made" (§ 5845(c)), not parts from which a weapon "can be made." *Any* rifle "can be made" into an NFA firearm by sawing off the barrel.[21] Moreover, the definition of the term "make" in § 5845(i) as including "putting together" means that something must be "put together" before it is an NFA firearm, or this definition would not exist. It must be an NFA firearm—such as "rifle"—that is not defined as a combination of parts. The government's focus on the definition of "make" as "or otherwise producing a firearm" begs the question, for it does not address when a firearm is produced.

The government assumes that lack of intent to make a Contender pistol and carbine kit into a short barrel rifle is irrelevant. However, all the evidence in the record is that no owner would have any intent to make

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[20] *TVA* v. *Hill*, 437 U.S. 153, 173 n.18 (1978) nicely describes BATF's position in this case:

> This recalls Lewis Carroll's classic advice on the construction of language:
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> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what *I* choose it to mean—neither more nor less." Through the Looking Glass, in The Complete Works of Lewis Carroll 196 (1939).

[21] The government seems to assume that if a tax crime can be "quickly and easily" committed, then it already has been committed. Yet one has not murdered someone just because one could "quickly and easily" do so, and one has not violated the Internal Revenue Code just because one could "quickly and easily" do so.

such a rifle. The very definition of rifle includes the terms "*intended* to be fired from the shoulder." § 5845 (c). It was never suggested in this case that Thompson/Center or anyone else did or would possess a pistol and carbine kit with the intent to make a weapon with a short barrel to be fired from the shoulder.[22]

The government argues that Congress would not have adopted a readily-restorable test without implicitly adopting a readily-convertible (or readily-makable) test. Br. 17-18. Congress did not do so, because every rifle is readily convertible in seconds by sawing to be a short barrel rifle, and also perhaps because pistol and rifle parts may be interchangeable. Perhaps Congress adopted a readily restorable test because an item had been a functional NFA firearm, was presumably possessed with intent to restore to such a weapon, and could be so restored in seconds such as by using a nail for a firing pin, as in *United States* v. *Cosey*, 244 F.Supp. 100, 102 (E.D.La. 1965). The Contender pistol and carbine kit "can be assembled"—the government is careful not to say "restored" —into a short-barrel rifle in about five to ten minutes. (Br. 16; C.A. App. 48.) Any such act would require intention and deliberation.

The government suggests that the Court's opinion would have a detrimental impact on enforcement of the firearms laws. No basis exists for this assertion. The

[22] The government seeks to change facts by linguistics in arguing that " 'complete kits' for assembling a regulated firearm are subject to regulation under the Act" (Br. 6), yet the government ignores that the Contender kit is *for* assembling a *non*regulated firearm. It asserts that the pistol and carbine kit "is literally a weapon 'designed . . . and intended to be fired from the shoulder' with 'a barrel or barrels of less than 16 inches in length' " (Br. 10), when in fact the "weapon" is literally "intended" to be fired from the shoulder with a barrel of 21″ in length. Similarly, instead of "the short barrel rifle resulting from use of its conversion kit" (Br. 9 n.7), there is a *long* barrel rifle resulting from use of the carbine kit.

only practical impact of the decision is that consumers need not purchase a complete pistol and a complete rifle—each with an identical receiver—but may purchase a pistol and rifle parts with only one receiver for use with each.

The government argues that some products, such as a bicycle, are shipped unassembled.[23] Br. 11. To use the same analogy, no one would say that bicycle handle bars are clubs, or that chains are weapons, just because they could be so used. Further, a bicycle is intended to be assembled into one and only one product, and is not defined in technical, legal terms in a taxing statute with criminal penalties. A better analogy would be a bottle, gas, and a rag, which constitute a Molotov-cocktail—an NFA "destructive device"—only if assembled or intended to be assembled as such.[24]

The government (Br. 10) misreads *Haynes* v. *United States*, 390 U.S. 85, 88 (1968), which states only that "the acts of *making* and *transferring* firearms are broadly defined," not that the firearms themselves are broadly defined. *See United States* v. *Biswell*, 406 U.S. 311, 313 n.2 (1972) ("the sawed-off rifles . . . fell under 26 USC § 5845's technical definition of 'firearms' "). In fact, the NFA definition of "firearm" encompasses such guns as are generally known to be highly regulated, not such innocuous sporting guns as a Contender pistol and carbine kit.[25] The National Firearms Act "may well be premised

[23] The government also states that rifles may be sold with bolts detached, and that shotguns have removable barrels. Br. 11 n.8. There is nothing in the record concerning this point. It could be that any such bolts may be inserted in five seconds.

[24] As stated in *United States* v. *Posnjak*, 457 F.2d 1110, 1119 (2nd Cir. 1972): "When, however, the components are capable of conversion into both such a device and another object not covered by the statute, intention to convert the components into the 'destructive device' may be important."

[25] As stated in *United States* v. *Anderson*, 885 F.2d 1248, 1250 (5th Cir. 1989) (en banc):

[Continued]

on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act. They are highly dangerous offensive weapons. . . ." *United States* v. *Freed*, 401 U.S. 601, 609 (1971). As noted by Justice Brennan, concurring: "the firearms covered by the Act are major weapons such as machine guns and sawed-off shotguns. . . . Without exception, the likelihood of governmental regulation of the distribution of such weapons is so great that anyone must be presumed to be aware of it." *Id.* at 616.

The government position in this case does not pass the above "smell test" set forth in *Freed*. None of the tens of thousands of sportsmen who own Contender pistols and carbine kits made by other companies (C.A. App. 58), would ever guess that they possess a "major weapon" and an NFA firearm. Defendant argues that the NFA is applicable to "gangster-type" weapons,[26] but then asserts that it is irrelevant that the Contender pistol and carbine kit is not a criminal-type weapon. (Br. 8). Defendant's argument reduces to bureaucratic hair-splitting nowhere suggested in the statute: an NFA firearm exists if only one Contender receiver is used to make a pistol and carbine, but does not exist if a person uses two identical

[25] [Continued]

> As used in the Act, the word "firearms" is a term of art that includes primarily weapons thought to be of a military nature and of no legitimate use for sport or self-defense. . . .
>
> Instead, the term is defined in the Act so as to narrow its meaning vastly in most respects. . . . Generally speaking, all such categories of ordinary rifles, pistols and shotguns as might be found in a gun shop are excluded from its meaning. . . .

[26] The government leaps from the premise that the Gun Control Act of 1968 was passed in reaction to the assassination of national leaders, to the conclusion that Congress must have tacitly enacted the same definition of a rifle as it explicitly wrote for a machinegun. (Br. 20-22.) It goes without saying that "made" and "rifle" were defined by legislation enacted in 1952 and 1954 respectively, and were only slightly modified in 1968.

Contender receivers, one for the pistol and one for the carbine. Nothing in the statute even hints at this arbitrary distinction invented by the agency.

II. AN AMBIGUITY IN A TAXING STATUTE WITH SEVERE CRIMINAL PENALTIES MUST BE CONSTRUED IN FAVOR OF THE TAXPAYER

Given the clear language of the statutory definitions, the Contender pistol and carbine kit do not constitute taxable "firearms" under § 5845(a). At the very least, considerable doubt exists as to whether the items are taxable.[27] Any ambiguity in a taxing statute with severe criminal penalties and no willfulness requirement must be construed in favor of the taxpayer. No deference is due to the agency construction of a criminal statute where the construction was invented long after adoption of the statute.

First, like all other taxing statutes, this one comes under the rule set forth in *Gould* v. *Gould*, 245 U.S. 151, 153 (1917):

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.

The definitions in the National Firearms Act are subject to the above rule of construction. "On its face it [the NFA] is only a taxing measure . . . ." *Sonzinsky* v.

[27] The government claims that the items here are "clearly" regulated weapons. Petition 5. In the court below it conceded: "When the facts of this case are compared to the language of § 5845, the statutory terms alone do not clearly indicate whether the Contender pistol and conversion kit together constitute a firearm." Appellee Brief 12.

United States, 300 U.S. 506, 513 (1937).[28] "In the exercise of its constitutional power to lay taxes, Congress may select the subjects of taxation, choosing some and omitting others." *Id.* at 512.

Auto-Ordinance Corp. v. *United States*, 822 F.2d 1566 (Fed. Cir. 1987) held certain firearm accessories which attached to a carbine not to be subject to a manufacturer's excise tax.[29] The Court reasoned:

> The best that can be said for the position of the defendant is that there may be some doubt as to the meaning of the word accessories in the pertinent regulation. Even assuming the existence of doubt, it is established that, in a tax refund case, the doubt should be resolved in favor of the taxpayer. See *White* v. *Aronson*, 302 U.S. 16, 20 . . . (1937). . . . (822 F.2d at 1571.)

The *White* case, which concerned whether certain items are taxable sporting goods, held:

> Where there is a reasonable doubt as to the meaning of a taxing act it should be construed most favorably to the taxpayer. . . . "Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them." 302 U.S. at 20-21.

Second, since it provides serious criminal penalties for violation, and does not even have a willfulness requirement (which exists in most tax statutes), the National Firearms Act must be interpreted in favor of lenity. "We are here concerned with a taxing act which imposes a penalty. The law is settled that 'penal statutes are to be construed strictly,' . . . and that one 'is not to be subjected to a penalty unless the words of the statute plainly impose it'. . . ."[30] *Commissioner* v. *Acker*, 361 U.S. 87, 91 (1959).

[28] *Haynes* v. *United States*, 390 U.S. 85, 88 (1968) described the National Firearms Act as "an interrelated statutory system for the taxation of certain classes of firearms." "The making and transfer taxes under the NFA are a form of excise tax." *Thompson/Center Arms Co.* v. *Baker*, 686 F. Supp. 38, 42 (D.N.H. 1988) (holding that the Contender carbine kit must be litigated as a tax refund claim).

[29] It is well established that a "kit" which could be assembled as a non-taxable article as well as a taxable article, is not subject to tax. *Tandy Leather Co.* v. *United States*, 347 F.2d 693, 694-95 (5th Cir. 1965).

The presence in the NFA of three vastly different "combination of parts" definitions, and the absence thereof in the definition of "rifle," indicates that no such definitions apply to "rifle." *Commissioner* v. *Engle*, 464 U.S. 206, 223 (1984) states: "We must dismiss the Commissioner's reconstruction of the legislative intent as mere wishful thinking . . . . We have noted that '[t]he true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained if it be considered apart from related sections. . . .'"

Russello v. *United States*, 464 U.S. 16, 23 (1983) distinguishes a section of a criminal statute which "speaks broadly" of certain acts, from other sections with "less expansive language," and states:

> "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." . . . We refrain from concluding here that the differing language in the two subsections has the same meaning in each.

[30] "'Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' . . . 'When choice has to be made between two reading of what conduct Congress has made a crime, it is appropriate before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *United States* v. *Bass*, 404 U.S. 336, 347-48 (1971) (construing Gun Control Act terms in favor of felon in possession of firearm).

"Rifle" having no definition like "combination of parts when possessed with only one receiver," such definition may not be imposed by bureaucratic or judicial fiat. As stated in *Hanover Bank* v. *Commissioner*, 369 U.S. 672, 687-88 (1962):

> We are not at liberty . . . to add to or alter the words employed to effect a purpose which does not appear on the face of the statute . . . Nevertheless, the Government now urges this Court to do what the legislative branch of the Government failed to do or elected not to do. This of course, is not within our province.

The government argues that the kit would allow a manufacturer to "avoid the tax."[31] Br. 11. Yet it is perfectly legitimate to avoid taxation simply by not making a taxable product.[32] *Comm'r* v. *First Security Bank of Utah*, 405 U.S. 394, 398 n.4 (1972) notes:

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[31] District Judge Getzendanner wrote in *United States* v. *Drasen*, 665 F. Supp. 598, 612 (N.D. Ill. 1987), *rev'd* 845 F.2d 731 (7th Cir. 1988), *cert. denied* 488 U.S. 909 (1988):

> It is clear that a person can now evade the federal regulations relating to the sale of short-barrel rifles (the conduct charged here) by simply selling long-barrel rifles to buyers who can then easily alter those rifles into short-barrel rifles by way of a hacksaw. The specter the government raises of unprecedented circumvention of an otherwise carefully drafted scheme regulating the sale of short-barrel rifles is therefore unrealistic given that the statute already permits possibilities for circumvention.

[32] The government's fear about "circumvention" of the NFA (Br. 7, 14) ignores that this case applies the statute only to the product in question, and it is clear that the Contender system is not a rifle "having" a barrel less than 16" in length which is "made" and "intended to be fired from the shoulder." Application of § 5845(a)(3), (c) to other products depends on the specific facts and intent in those cases. Certainly a person who deals in long-barrel rifle parts could also "possess independently a single short-barrel part (which is being used for some unrelated, innocent purposes). . . ." *United States* v. *Drasen*, 665 F. Supp. at 613. By contrast, the government could prove that a short barrel has been assembled onto a rifle by physical evidence or by admissions. It is hardly too much to ask that a *malum prohibitum* tax statute require the prosecution to prove intent, when all homicide statutes do so. "A court should not judicially rewrite a statute to alleviate some of the burdens of proof Congress has apparently chosen to place on the government." *Id.*

> Taxpayers are, of course, generally free to structure their business affairs as they consider to be in their best interests . . . . Perhaps the classic statement of this principle is Judge Learned Hand's comment in his dissenting opinion in Commissioner v. Newman, 159 F.2d 848, 850-851 (CA2 1947):
>
> "Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant."

Thirdly, the government appeals to the divine right of deference to agency opinion, neglecting that "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[33] *Cherron U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Even when appropriate, the *Chevron* deference rule normally applies in construction of civil

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[33] Courts have rejected BATF opinions about what are "firearms" in both civil and criminal cases. *E.g.*, *Davis* v. *Erdmann* 607 F.2d 917, 920 (10th Cir. 1979) (BATF position that item was likely to be used as a weapon "appears to be a classic example of agency 'nit picking,' and an arbitrary and capricious action."); *United States* v. *Brady*, 710 F. Supp. 290, 293 (D. Colo. 1989) (regarding a device "that as a matter of practicality and common sense would never be used for that purpose [as an NFA firearm] by a sane person."); *United States* v. *Seven Miscellaneous Firearms*, 503 F.Supp. 565, 570 (D.D.C. 1980) (finding items not be a short barrel rifle or other NFA firearms); *United States* v. *Green*, 515 F.Supp. 517, 521 (D. Md. 1981) ("the agency interpretation is entitled to no deference whatsoever.").

statutes without serious criminal penalties. No deference is due an agency in interpretation of a criminal statute, even when applied in civil cases.[34] *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 296 (1954).[35] As Justice Stevens wrote in *Crandon* v. *United States*, 110 S.Ct. 997, 1001-02, 108 L.Ed.2d 132 (1990): "Because the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage." [36]

Moreover, to which agency's opinion should the Court defer? The private letter rulings to Thompson/Center and other entities between 1971 and 1985 show that the agency

[34] The NFA is litigated almost exclusively in criminal prosecutions, and violation requires proof of neither wilfulness nor knowledge. *See* 26 U.S.C. § 5861. By contrast, most tax statutes are applied primarily in civil contexts, wilfulness is typcially required for a criminal prosecution, and Congress delegated more regulatory power to Treasury in such matters. Thus, *United States* v. *Correll*, 389 U.S. 299 (1967) and similar cases cited by the government (Br. 15) have no relevance here.

[35] In that case, the agency was empowered to "make such rules and regulations . . . as may be necessary in the executions of its functions. . . ." *Id.* at 290 n.7. Nonetheless, the Court held:

> It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give [the statute] the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. . . . It would do violence to the well-established principle that penal statutes are to be construed strictly. *Id.* at 296.

[36] The concurring opinion by Justice Scalia, with whom Justices O'Connor and Kennedy joined, explains in more detail:

> To give persuasive effect to the Government's expansive advice-giving interpretation of [the statute] would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity. *Id.* at 1011-12.

interpreted the statute to exclude a pistol and carbine kit from the definition of an NFA firearm just after passage of the 1968 Act. (C.A. App. 31-42.) These rulings are inconsistent with the agency position invented in 1985.

The official interpretation adopted just after passage of the 1968 Act and consistently applied thereafter has far more weight than the abrupt shift made without prior management review in 1985. (C.A. App. 26.) See *Rice* v. *Rehner*, 463 U.S. 713, 730 n.13 (1983) ("that early position . . . is surely more indicative of congressional intent in 1953 than a 1971 opinion to the contrary"). The following administrative history further undercuts the government's appeal to agency deference.

Congress defined "make" in 1952, and "rifle" in 1954. Treasury adopted a regulation defining "make" which clearly stated that parts must be put together. 17 F.R. 7842, 7846 (Aug. 28, 1952); 20 F.R. 6739, 6740 (Sept. 14, 1955). As stated in 26 C.F.R. § 179.29 (1955):

> *Making of a firearm.* The "making of a firearm" shall mean the production or creating of a firearm by any means, whether by manufacture, putting together of parts, alteration, any combination thereof, or otherwise, and by any process of manipulation or transformation of any other weapon.
>
> *Examples*: (1) The sawing off of a barrel or barrels of a shotgun to a length of less than 18 inches, or (2) the altering of a semiautomatic pistol by the change or addition of parts so as to produce a fully automatic or machine gun type of firearm.

Thus, "making" included "putting together of parts"—not mere possession of parts. Further, if "manufacture" or "otherwise" meant mere possession of parts, then "putting together of parts" would be superfluous. Again, the terms "manipulation or transformation of any other weapon" also suggest that the parts of a non-NFA weapon be manipulated or transformed so as to assemble an NFA firearm.

The two examples above also suggest that mere capacity to make an NFA firearm did not constitute an NFA firearm. The barrel of a shotgun must be actually sawed off. A semiautomatic pistol must actually be altered by having its parts changed or added to, before it would be a machinegun. (This was before enactment in 1968 of combination-of-parts language for a machinegun.)

Treasury has long been aware that some pistols and rifles are designed to utilize identical receivers, as do the Contender pistol and carbine. Rev. Rul. 56-296, 1956-1 C.B. 553-554 discussed two single shot pistols "employing *an 'action' [i.e., receiver with parts*[37]*] susceptible but not confined to use in either a single shot pistol or rifle*, and designed to be aimed and fired from the hand. Accordingly, such pistols are not firearms within the intent of § 5848 of the Code." (Emphasis added.)

Similarly, Rev.Rul. 59-340, 1959-2 C.B. 375-376 found a pistol and rifle kit utilizing the same receiver not to be a short barrel rifle:

> With the pistol barrel removed, the basic mechanism can be inserted into a one piece rifle frame with a .22 caliber barrel having a length of over 16 inches. Held, the Unique Model L, pistol and rifle attachment, a combination pistol and rifle, is not a firearm within the purview of the National Firearms Act. . . .

The revenue rulings cited by the government do not apply to the Contender pistol and carbine kit. (Br. 15, 17.) Rev.Rul. 61-45, 1961-1 C.B. 663, concerns a Mauser or Luger semiautomatic pistol with a short barrel and a shoulder stock. "The shoulder stock attaches to the pistol instantly or in a matter of one or two seconds." (C.A. App. 49.) Pistols with instantly attachable shoulder stocks and *only* a short barrel are intended to be short barrel

[37] "Action. The working mechanism of a firearm." Glossary of the Association of Firearm and Toolmark Examiners 1 (1985).

rifles, and after being put together just once, are "readily restorable" as such. Yet Treasury held that if they also have barrels over 16" for use when the shoulder stock is attached, the same pistols are *not* short barrel rifles. As Rev.Rul. 61-203, 1961-2 C.B. 224 states: "Where one of the above described pistols has a barrel of 16 inches or more in length, it is held not to be a 'firearm,' within the definition of section 5848(1) of the Act, even though such weapon has an attached or attachable shoulder stock." [38]

BATF opined in 1985 that a pistol and shoulder stock must be intended to go together, and that mere attachability does not imply an offense if a legitimate purpose exists:

> Certain Luger pistols with shoulder stocks have been removed from the provisions of the NFA. If a person possessed such a Luger with a stock, and also possesses other Lugers which were not exempted with the stock, the person would not possess an NFA firearm unless the stock was actually fitted to one of the non-exempt Lugers, or unless there was some evidence to show that the stock was actually meant for a non-exempt Luger. (C.A. App. 42.)

Similarly, this 1985 opinion stated that a Thompson (no relation to Thompson/Center) rifle and pistol with easily interchangeable barrels were not an NFA firearm "unless the person actually assembled a short-barrelled rifle. . . ." *Id.* at 40. By contrast, an UZI rifle and a short barrel, and an unassembled silencer, were NFA firearms (*id.*), apparently because these items could be assembled *only* as NFA firearms. A "conversion kit" to make an UZI short barrel rifle is clearly not analogous to a Contender carbine kit to make a long barrel rifle. (*See* Br. 14 n.14).

[38] Rev. Rul. 61-45 and 61-203 were "modified so that the rulings do not apply to the listed guns with accompanying shoulder stocks. . . ." (List deleted.) Rev. Rul. 70-517, 1970-2 C.B. 327.

The silencer kits discussed by the government may be assembled only as silencers. (Br. 6-7 and 23, citing H.R. Rep. No. 495, 99th Cong., 2d Sess. 21 (1986).) The government relies on the statement of Edward M. Owen, BATF technician, that a complete silencer kit is a silencer. Br. 23 n. 20. This is the same Mr. Owen who previously wrote that a pistol with a shoulder stock with a long barrel and a short barrel, is not a short barrel rifle unless the short barrel and shoulder stock are attached to the pistol at the same time. (C.A. App. 22-24, 34.) Mr. Owen repeated this opinion in 1983. *Id.* at 38.

In sum, it is unclear to which administrative opinion the court should defer, since much of it favors Thompson/Center. Far more useful tools of construction are the rules that ambiguous taxing statutes must be interpreted in favor of the taxpayer, and that statutes with criminal penalties must be interpreted in favor of lenity.

III. THE CIRCUITS ARE NOT IN CONFLICT

A. No Other Reported Cases Concern a Pistol and Carbine Kit

This is a case of first impression. Other than the Court of Appeals' decision, no other Court has ever addressed whether a pistol and carbine kit intended only for making a rifle with a barrel over 21" nonetheless constitutes a rifle with a barrel under 16". The circuits are not in conflict.

The government argues that pre-1968 machinegun cases are somehow relevant, because they were decided before Congress adopted "combination-of-parts" language. (Br. 12-13, 21.) The government cites *United States* v. *Lauchli*, 371 F.2d 303, 311 (7th Cir. 1966), yet that case states "that the purchasers demanded operable machineguns, the defendant assembled seven of them. . . ." The government also relies on *United States* v. *Kokin*, 365 F.2d 595, 596 (3rd Cir. 1966), but the conviction was

affirmed "in the circumstances elaborated in the opinion of the district court . . . ." *Id.* at 596. While unpublished, that opinion was available to the court in *Lanchli*, which states: "As in *United States* v. *Kokin*, . . . this defendant even assisted in the assembly of seven of the weapons." 371 F.2d at 313.

Besides machineguns, the government discusses silencers, which are equally irrelevant to the definition of "rifle."[39] These silencer cases are further inapplicable because Congress revisited the issue in 1986, and determined which combination of parts would constitute silencers—i.e., parts "designed or redesigned, and *intended* for use in assembling or fabricating a firearm silencer."[40] This precludes combinations of parts which could be, but are not "intended" to be, assembled as silencers.[41]

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[39] The government relies on *United States* v. *Endicott*, 803 F.2d 506 (9th Cir. 1986) and *United States* v. *Luce*, 726 F.2d 47 (1st Cir. 1984). (Br. 10-12.) Unlike the pistol and carbine kit, there was only one manner in which to assemble these silencer parts, that manner was unlawful, and the parts "could be joined together within a few seconds." *Luce*, 726 F.2d at 49; *Endicott*, 803 F.2d at 509. These opinions approved jury instructions, did not state as a matter of law that all such combinations of parts were silencers, and assume that the parts in question were *intended* to be assembled as silencers. *See* 803 F.2d at 508-509. Contrary to the government (Br. 12 n.11), Congress did not codify *Luce* and *Endicott*, because those cases contain no "design and intent" requirements as does 26 U.S.C. § 5845(a)(7).

[40] 18 U.S.C. § 921(a)(24); 26 U.S.C. § 5845(a)(7). By requiring intent, the statutory amendment repudiates *Endicott* and *Luce*, which required no intent. Thus, Congress rejected these decisions on the very point for which the government relies on them—a strict liability, no intent, combination-of-parts definition for *every* NFA firearm.

[41] The silencer definition does not include combinations of parts just because they *could* be used on a firearm—rather, specific intent is required. Indeed, only a "device *for* silencing, muffling, or diminishing the report of a portable *firearm*" is included, thereby excluding a silencer or muffler for an antique firearm (which is

In *United States* v. *Woods*, 560 F.2d 660, 664-65 (5th Cir. 1977), *cert. denied* 435 U.S. 906 (1978), for purposes of finding probable cause for a search, the court held that a short barrel found near the rest of a shotgun "was capable of being 'readily restored to fire a fixed shotgun shell'. . . ."[42] Nothing in the case suggests that the short barrel was possessed for some innocent, nontaxable purpose.[43] The jury may well have heard evidence that the barrel had previously been attached to the rest of the weapon. By contrast, in the case at bar, the short barrel is possessed only for use in pistol configuration.

The government claims that *United States* v. *Combs*, 762 F.2d 1343, 1345 (9th Cir. 1985) is inapplicable (Br. 14), yet that case held a person to have "made" a short barrel rifle under Section 5845(i) because he assembled it as such:

> The Uzi rifle is sold in the United States with a 16-inch barrel and has a warning imprinted on it that it is illegal to modify the weapon in any way. In addition, the instructional manual that comes with the Uzi states that to take out the 16-inch barrel and replace it with a shorter barrel creates an illegal weapon. The evidence at trial indicated that the *barrel originally attached to the rifle was detached and*

excluded from the definition of "firearm" under 18 U.S.C. § 921 (a)(3), (16)), a nonportable firearm, an airgun, or a lawn mover.

[42] None of the other cases cited by the government (Br. 10-11, 18), except *Drasen, infra*, involves a rifle. *E.g., United States* v. *Smith*, 477 F.2d 399 (8th Cir. 1973) (machinegun). In *United States* v. *Catanzaro*, 368 F. Supp. 450, 452 (D. Conn. 1973), which involved a readily restorable sawed-off shotgun, the court denied a motion to dismiss an indictment, and thus did not find that the item was an NFA firearm beyond a reasonable doubt. In neither of those cases were there legitimate, non-NFA uses for the items in question.

[43] Whether used with a shoulder stock or on a pistol, a shotgun (smooth bore) barrel under 18" makes an NFA firearm. 26 U.S.C. § 5845(a)(1), (5), (d), and (e). By contrast, the 10" Contender pistol barrel has a legitimate non-NFA purpose. Accordingly, comparisons to shotgun barrels are irrelevant.

> *the shortened barrel installed* in its place. . . . Combs *bought the shorter barrel and installed it. Thus the Uzi* was altered by Combs and therefore *was "made" within the terms of the statute. Id.* at 1347. (Emphasis added).

United States v. *Zeidman*, 444 F.2d 1051, 1052 (7th Cir. 1971) dealt with a semiautomatic Browning pistol with an instantly attachable shoulder stock. (*Cf.* Br. 10-11, 13). The unit was "readily restorable" as a short barrel rifle, because defendant offered for sale a "pistol with a *detachable* shoulder stock"—implying that it was on the pistol at the time—and the prospective buyer had "affixed the shoulder stock to the back of the pistol. . . . When so assembled the Browning instrument constituted a short barreled rifle." *Id.* at 1053. These items are not similar to the Contender pistol and carbine kit, the 21" barrel of which gives a legitimate purpose for the shoulder stock, which in turn is not instantly attachable.[44] Finally, *Zeidman* was decided in the context of whether probable cause to seize existed, not whether final disposition of the case by the fact finder was proper.

B. *Drasen* Does Not Apply to the Products at Issue, and is Based on a Revoked Revenue Ruling

The primary case relied on by the government is *United States* v. *Drasen*, 665 F.Supp. 598 (N.D. Ill. 1987), *rev'd* 845 F.2d 731 (7th Cir. 1988), *cert. denied* 488 U.S. 909 (1988). However, the Contender pistol and carbine kit is easily distinguishable from this opinion in which two judges could not agree with two other judges on whether rifle parts kits can be "rifles" for purposes of a pretrial motion to dismiss the indictment.

District Judge Susan Getzendanner, in perhaps the most thorough opinion on what is an NFA firearm ever

[44] It is noteworthy that BATF now classifies the Browning semiautomatic pistol with shoulder stock as a collector's item not likely to be used as a weapon, and thus not an NFA firearm. C.A. App. 48-49.

published, rejected the government's argument that the "readily restored" definition of "rifle" includes parts from which a rifle had never been constructed, because "all persons of common intelligence understand 'restore' to mean 'return to a previous condition.' People are not required to divine the government's secret modification of that definition . . . ." 665 F. Supp. at 603. The "weapon" definition of rifle does not apply because "the court has great difficulty seeing how the never-assembled constituent parts of a rifle are themselves a weapon 'made' to fire." *Id.* at 608.

In a 2-1 opinion, the Court of Appeals reversed and remanded to allow the fact finder to decide the issue. The court framed the issue to concern "constituent parts of a rifle" (845 F.2d at 732)—again distinguishing that case from the case at bar, in which the long barrel is the part of a rifle, and the short barrel is the part of a pistol.

The *Drasen* majority uses the euphemism "common sense interpretation" when unable to explain the clearly different definitions of rifle and machinegun. *Id.* at 731. Its reading into the statute of an implicit "combination-of-parts" definition for *all* NFA firearms is plainly inconsistent with the explicit "intent" requirements in the definitions of destructive device and silencer.[45] This explains why the Congressional sponsors of new "combination of parts" language in the Firearms Owners' Protection Act of 1986 filed an amici curiae brief against the government's position in *Drasen*.[46]

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[45] The court was flatly wrong in asserting (845 F.2d at 735) that Congress did not include a combination-of-parts-plus-intent definition for "silencer." §§ 101, 109, P.L. 99-308, 100 Stat. 451, 460 (May 19, 1986).

[46] Amici included Senators Orrin E. Hatch and James A. McClure and Congressman Larry E. Craig. 845 F.2d at 732 n.4. Congressman Craig is credited with a floor amendment in the House which resulted in the new definitions of silencer and machinegun. Senators Hatch and McClure explained the new definition of machinegun,

The majority opinion in *Drasen* is based on an intellectually nihilistic inability to explain why an NFA "rifle" has no combination-of-parts definition, but three other NFA firearms do have such definitions. It is at a total loss to explain why rifle is defined as an operable "weapon"—"*intended* to be fired from the shoulder" at that—or as a "readily restorable" weapon, but that a machinegun is a weapon, a readily restorable weapon, *or* a combination of parts from which a complete weapon can be assembled.[47]

The *Drasen* majority attacks this "nonsensical statutory distinction" enacted by Congress and adds that "defendants would have us draw the conclusion that for some inexplicable reason Congress intended to distinguish short-barrel rifles."[48] 845 F.2d at 736-37. Congress can conjure up any "nonsense" it wishes, and give or not give "explicable" reasons, when it decides what to tax and

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which concerned conversion parts only. 132 CONG.REC. H1700 (Apr. 9, 1986); 132 CONG.REC. S5362-5363 (May 6, 1986).

[47] The majority inaccurrately states that the "combination-of-parts" definition means that "every single [machinegun] part could be subject to regulation." 845 F.2d at 737; *see* Br. 21. (It is unclear how this proves that rifle has some kind of implicit combination-of-parts definition.) The definition is not "any machinegun or part thereof," but is "any *combination* of parts from which a machinegun can be assembled if *such parts* are in the possession or under the control of a person." § 5845(b). As noted by Senators Hatch and Kennedy in debate on the 1986 amendments, most machinegun parts are not even regulated. 132 CONG.REC. S5362-63 (May 6, 1986).

The *Drasen* majority's argument was repudiated in *United States v. Bradley*, 892 F.2d 634, 636 (7th Cir. 1990)) because "a statutory machinegun" exists only "if one person has possession or control of *all* of the parts."

[48] As Judge Manion noted in dissent, "the definition of 'machinegun' shows that when Congress wanted to regulate combinations of parts, or 'any' parts, it knew how to do so with precision. Congress has not included such precise language in the definition of rifle." *Id.* at 738.

what not to tax, and the latter is not thereby a "loophole" for courts to abrogate.

Since it seeks to impose a strict liability, combination-of-parts definition for all NFA firearms, the *Drasen* majority carefully ignores the definition of destructive device. A combination of parts from which a destructive device "could" be assembled—such as a bottle, firecracker, and paint thinner—is not such a device unless intent to do so exists. *United States* v. *Tankersley*, 492 F.2d 962, 966-67 (7th Cir. 1974). "While the components separately have social utility, in combination they form a destructive device. . . ." *Id.* The Contender pistol and carbine kit is no more an "unassembled" short barrel rifle than certain common household containers and flammable chemicals are "unassembled" Molotov cocktails and hence "destructive devices."

Drasen assumes that a manufacturer of parts capable of and intended for legal assembly [49] is guilty of a tax offense because a consumer could commit a tax offense, i.e., making a short barrel rifle without following the procedures in the NFA. Yet firearms manufacturers are not responsible if a consumer commits a murder with a firearm. *Martin* v. *Harrington & Richardson, Inc.*, 743 F.2d 1200, 1205 (7th Cir. 1984) held that "criminal misuse of a handgun is not a foreseeable consequence of gun manufacturing." If a handgun manufacturer is not responsible for a murder, it is difficult to understand why Thompson/Center is being held responsible because some consumer "could" commit a tax offense.

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[49] The court ignores that during the production process, parts which could be assembled as NFA firearms are transformed into non-NFA firearms. For instance, before rifling is cut inside a 16 inch barrel, the barrel has a smooth bore. The parts are not thereby a shotgun with a barrel less than 18". 26 U.S.C. § 5845(a)(1), (d). Similarly, a rifle barrel could be first made to be 14" in length, and then a 3" barrel attachment welded on to make a 17" barrel. The mere parts were not a short barrel rifle before completion of the welding.

The majority opinion in *Drasen* frankly admits that the pertinent terms could easily be interpreted to exclude the items in question from being NFA firearms.[50] The court thereby completely disregards the cardinal principles that tax statutes are to be construed in favor of taxpayers, and that criminal statutes are to be resolved in favor of lenity.

The government's brief is conspiciously silent about a revenue ruling on which the government relied in *Drasen* and in the Claims Court in this litigation.[51] Only on appeal did Thompson/Center discover that the agency had long ago declared the ruling to be obsolete.

The Claims Court opined that "published revenue rulings are given weight, as they represent the agency's official interpretation of the statute. . . . Rev. Rul. 54-606, 1954-2 C.B. 33, held that possession of sufficient parts to assemble a firearm constitutes possession of a firearm." [52] (Pet. App. 28a.) The Court then (*id.* n.2) cited *Drasen*, 845 F.2d at 736, which was the only prior published opinion ever to approve this 1954 Revenue Ruling.[53]

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[50] The Court admits: "Applying the facts of this case, the statute on its face is not clear. . . . It is apparent that to clarify the statute, little additional language would have been needed to accomplish what the government claims Congress intended. The statute could have defined a rifle as also including the parts thereof that could be readily assembled to form a functioning weapon. . . . This definition ['make'] suggests that, to produce a firearm, 'putting together' the parts is necessary." *Id.* at 733.

[51] The government repeatedly assured the court that Revenue Ruling 54-606 had never been modified or revoked. *E.g.*, Memo. in Opp. to Plaintiff's Mot. for Sum. Jud. at 4.

[52] The ruling "does not indicate one way or another whether rifle parts need to have been once-before assembled in order to be a 'rifle.'" *United States* v. *Drasen*, 665 F. Supp. at 603, 608.

[53] *See United States* v. *Lauchli*, 371 F.2d 303, 312 (7th Cir. 1966) ("we need not go as far as the Internal Revenue Ruling [54-606]").

Instead of informing the courts that Revenue Ruling 54-606 had been declared obsolete in 1972, the prosecution in *Drasen* urged the ruling upon the courts. "When the government's rhetoric is washed aside, its position essentially comes down to a single Revenue Ruling." 665 F.Supp. at 603, 608. The *Drasen* appellate majority relied primarily on the ruling. In arguing that the Supreme Court not grant Drasen's petition for certiorari, the Solicitor General relied principally on the revenue ruling.[54]

While unknown to the Claims Court, to the *Drasen* majority, and to this Court when it considered Drasen's petition, the Department of the Treasury officially repudiated Rev. Rul. 54-606 in 1972. Because Congress clarified in the Gun Control Act of 1968 which NFA firearms would be defined as combinations of parts and which would not,[55] Rev. Rul. 72-178, 1972-1 C.B. 423-24 held:

> Numerous changes in the law . . . necessitated a review of all outstanding revenue rulings issued under Chapter[] . . . 53 of the Internal Revenue Code of 1954 [the National Firearms Act] . . .
>
> It has been determined that the following list of revenue rulings are inapplicable either in whole or in part to the current law and regulations . . . . Therefore, these revenue rulings are found to be no longer in effect, and are hereby declared to be obsolete. *Rev. Rul.No.* . . . . 54-606.

[54] *See* Memorandum for the United States in Opposition, *Drasen* v. *United States*, U.S. Sup. Ct., No. 88-430, at 2, which describes the dismissal of the indictment by the district court and states:

> The court of appeals, in a split decision, reversed (Pet. App. 1-16). The court relied on a formal ruling of the Commissioner of Internal Revenue interpreting the statute, after it was adopted in 1954, to reach the possession of sufficient parts to assemble an operative firearm. Rev. Rul. 54-606, 1954-2 C.B. 33.

The Solicitor General made several more references to the ruling and never informed the Court that the ruling had been revoked in 1972.

[55] Rev. Ruling 54-606 was not mentioned in the entire legislative record which culminated in the 1968 Act, which repudiated the content of the ruling except with regard to machineguns.

After the 1968 Act passed, Treasury adopted regulations to reflect the statutory definitions of rifle, machinegun, and destructive device *verbatim*. *See* 36 F.R. 14255, 14257-58 (Aug. 3, 1971).[56] The ruling was declared obsolete because it was "inapplicable either in whole or in part to the current law and regulations." Rev. Rul. 72-178. The "*current* law" was, of course, the 1968 amendments which clarified which firearms under the National Firearms Act include combinations of parts and which do not.

In sum, *Drasen*—the government's main "precedent"—is based on a revenue ruling which, unbeknown to the court, had been declared obsolete. The government's amnesia about its promotion of this revoked ruling illustrates the unreasonableness of its position in this case.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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December 1991

[56] 27 C.F.R. § 179.11 currently defines "rifle," "machinegun," and other firearms exactly as defined in 26 U.S.C. § 5845.

No. 91-164

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

THOMPSON/CENTER ARMS COMPANY,
A DIVISION OF THE K.W. THOMPSON
TOOL COMPANY, INC.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
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TABLE OF AUTHORITIES

Cases:	Page
Commissioner v. *Portland Cement Co.*, 450 U.S. 156 (1981)	6
Gould v. *Gould*, 245 U.S. 151 (1917)	6
Haynes v. *United States*, 390 U.S. 85 (1968)	6
Helvering v. *Winmill*, 305 U.S. 79 (1938)	6
Morgan v. *United States*, 564 F.2d 803 (8th Cir. 1977)	5
Rowan Cos., Inc. v. *United States*, 452 U.S. 247 (1981)	13
Sonzinsky v. *United States*, 300 U.S. 506 (1937)	6
Thompson/Center Arms Co. v. *Baker*, 686 F. Supp. 38 (D.N.H. 1988)	7
United States v. *Anderson*, 885 F.2d 1248 (5th Cir. 1989)	5
United States v. *Cartwright*, 411 U.S. 546 (1973)	6
United States v. *Correll*, 389 U.S. 299 (1967)	6, 14
United States v. *Cowper*, 503 F.2d 130 (6th Cir. 1974), cert. denied, 420 U.S. 930 (1975)	5
United States v. *DeBartolo*, 482 F.2d 312 (1st Cir. 1973)	5
United States v. *Endicott*, 803 F.2d 506 (9th Cir. 1986)	2
United States v. *Freed*, 401 U.S. 601 (1971)	
United States v. *Gonzalez*, 719 F.2d 1516 (11th Cir. 1983), cert. denied, 465 U.S. 1037 (1984)	5
United States v. *Herbert*, 698 F.2d 981 (9th Cir.), cert. denied, 464 U.S. 821 (1983)	5
United States v. *Kokin*, 365 F.2d 595 (3d Cir.), cert. denied, 385 U.S. 987 (1966)	2
United States v. *Lauchli*, 371 F.2d 303 (7th Cir. 1966)	2
United States v. *Luce*, 726 F.2d 47 (1st Cir. 1984)	2
United States v. *Mitchleider*, 835 F.2d 769 (10th Cir. 1987), cert. denied, 485 U.S. 980 (1988)	5
United States v. *Ranney*, 524 F.2d 830 (7th Cir. 1975), cert. denied, 424 U.S. 922 (1976)	5

Cases—Continued: Page

United States v. *Shilling*, 826 F.2d 1365 (4th Cir. 1987), cert. denied, 484 U.S. 1043 (1988) 5
United States v. *Thomas*, 531 F.2d 419 (9th Cir), cert. denied, 425 U.S. 996 (1976) 5
United States v. *Williams*, 872 F.2d 773 (6th Cir. 1989) 5
White v. *Aronson*, 302 U.S. 16 (1937) 6

Statutes and regulation:

Gun Control Act of 1968, Pub. L. No. 90-618, Tit. II, § 201, 82 Stat. 1231 11
26 U.S.C. 5845(a) 10, 14, 16
26 U.S.C. 5845(a)(1) 16
26 U.S.C. 5845(a)(4) 4
26 U.S.C. 5845(a)(5) 16
26 U.S.C. 5845(a)(7) 1
26 U.S.C. 5845(b) 1
26 U.S.C. 5845(c) 3, 4
26 U.S.C. 5845(f) 1
26 U.S.C. 5845(i) 4, 8
26 U.S.C. 5861 4
26 U.S.C. 5871 4
26 U.S.C. 6110(j)(3) 13
26 U.S.C. 7805 14
26 C.F.R. 179.29 (1955) 8
27 C.F.R. 71.41(d)(iii)(B) 13

Miscellaneous:

4 *BATF Quarterly Bulletin* (1990) 12
37 Fed. Reg. 11,696 (1972) 14
H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954) 3
H.R. Rep. No. 495, 99th Cong., 2d Sess. (1986) 2
Rev. Proc. 67-6, 1967-1 C.B. 576 ..... 11, 12
Rev. Rul. 54-606, 1954-2 C.B. 33 ..... 7, 10, 11
Rev. Rul. 56-296, 1956-1 C.B. 553 8
Rev. Rul. 59-340, 1959-2 C.B. 375 9
Rev. Rul. 61-45, 1961-1 C.B. 663 ..... 9, 10, 11
Rev. Rul. 61-203, 1961-2 C.B. 224 ..... 9, 10, 11
Rev. Rul. 72-178, 1972-1 C.B. 423 ..... 10, 11

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-164

UNITED STATES OF AMERICA, PETITIONER

v.

THOMPSON/CENTER ARMS COMPANY, A DIVISION OF THE K.W. THOMPSON TOOL COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

1. Respondent argues (Resp. Br. 6-14) that our interpretation of the term "rifle" in the National Firearms Act is incorrect, because NFA definitions of "machinegun," "silencer," and "destruction device" all include combinations of parts, see 26 U.S.C. 5845(b), 5845(a)(7), 5845(f), while the NFA definition of "rifle" does not expressly refer to the status of a combination of parts comprising a complete, but partially unassembled, rifle.

Our opening brief shows (at 12 nn.10-11, 19-26) that, at least with respect to the statutory definitions of "machinegun" and "silencer," Congress added "combination of parts" language only after judicial

decisions (as well as consistent administrative practice, see pp. 7-13, *infra*) had interpreted those provisions to include combinations of parts, in effect ratifying those decisions.[1] See *United States* v. *Lauchli*, 371 F.2d 303, 311-313 (7th Cir. 1966) (machineguns); *United States* v. *Kokin*, 365 F.2d 595, 596 (3d Cir.), cert. denied, 385 U.S. 987 (1966) (machineguns); *United States* v. *Endicott*, 803 F.2d 506, 508-509 (9th Cir. 1986); (silencers); *United States* v. *Luce*, 726 F.2d 47, 48-49 (1st Cir. 1984) (silencers). Thus, the consistent trend of the case law, well-known to Congress, was to interpret an NFA "firearm" to include not only a complete, fully assembled weapon that came within the NFA's categories, but also a complete, but partially unassembled, weapon that came within the NFA's categories. The fact that Congress ratified that interpretation with respect to "machineguns," "silencers," and "destructive devices"—the first two of which had been the subject of appellate decisions—hardly shows that it intended that it should not be employed with respect to the remaining NFA categories, such as "rifles."[2]

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[1] To be sure, Congress also added an intent requirement to its definitions of "silencer" and "destructive device." Yet, if the purpose of the amendment was to *narrow* the pre-existing, consistent judicial and administrative interpretation of the statute with respect to silencers and destructive devices, Congress's failure similarly to redefine the term "rifle" suggests simply that Congress did *not* intend similarly to narrow the definition of rifle.

[2] Indeed, as our opening brief notes (at 23), Congress expressly referred to the already-existing "prohibition on selling complete kits" when it defined "silencer" in 1986 to include complete and incomplete silencer kits. H.R. Rep. No. 495, 99th Cong., 2d Sess. 21 (1986).

In addition, the NFA's definition of "rifle" is in one respect broader than its definitions of "machinegun," "silencer," or "destructive device." Under the NFA, a "rifle" is "a weapon * * * made * * * and intended to be fired from the shoulder." 26 U.S.C. 5845(c).[3] The term "make" does not appear in the NFA definitions of "machinegun," "silencer," or "destructive device." Yet, the NFA defines "make," as well as its "various derivatives," to include "putting

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[3] Quoting (Resp. Br. 8 n.8) the House committee report for the 1954 revision of the Internal Revenue Code, which added the definition of "rifle" to the NFA, respondent contends that the definition was adopted "to narrow the scope of rifles being interpreted as subject to the NFA." Resp. Br. 8. The quotation in respondent's brief, however, contains an ellipsis in place of language making clear that Congress intended to address a more particular problem. The material omitted from the ellipsis is:

> For example, under a technical interpretation of the term "firearm," blunderbusses, muzzle-loading shotguns, and other ancient or antique guns have been considered subject to the National Firearms Act and in many instances the requirements thereof have been imposed. As a result of these interpretations, over a period of years, restrictions have been imposed on a certain class of persons, namely, antique gun collectors, and it is felt that these restrictions should be removed in pursuance of the clearly indicated congressional intent to cover under the National Firearms Act only such modern and lethal weapons, except pistols and revolvers, as could be used readily and efficiently by criminals or gangsters.

H.R. Rep. No. 1337, 83d Cong., 2d Sess. A395 (1954). While the report makes clear that Congress intended to narrow the statute to exclude "blunderbusses, muzzle-loading shotguns, and other ancient or antique guns" from the Act, nothing in the report suggests that Congress intended any retreat from its requirement that short-barrel rifles be taxed and registered under the NFA.

together * * * or otherwise producing a firearm." 26 U.S.C. 5845(i). Nothing in the statute requires that the "putting together" constitute a complete assembly; if there were any doubt on that point, the "otherwise producing" clause lays it to rest. Thus, the statutory definition of "rifle" was in no need of amendment to make clear that a complete, but partially unassembled, short-barrel rifle is an NFA firearm.

2. Respondent points out that the NFA provides that a "rifle" must be "intended to be fired from the shoulder," 26 U.S.C. 5845(c), and asserts that no one "did or would possess a pistol and carbine kit with the intent to make a weapon with a short barrel to be fired from the shoulder." Resp. Br. 18. Respondent, however, does not deny that its unit consisting of a pistol plus conversion kit containing a shoulder stock is designed for use as a "rifle" that is "intended to be fired from the shoulder." Nor can respondent deny that the unit is designed and marketed in a manner that enables the purchaser, at his option, readily to assemble it into a short-barrel rifle, to be fired from the shoulder. The particular uses that particular purchasers will make of the unit obviously is not a matter within respondent's control. Nothing in the NFA requires that a short-barrel rifle is subject to tax and registration only if its manufacturer intends that it be assembled with a short barrel. See 26 U.S.C. 5845(a)(4).[4] And, in any event, by producing and selling

[4] This case is not a criminal prosecution, and the intent requirements and other elements of a criminal offense under the NFA's criminal enforcement provisions, see 26 U.S.C. 5861 and 5871, are accordingly not at issue. Generally, in criminal prosecutions under the NFA, the government must prove that the defendant knew that the weapon at issue was a firearm in the general sense, although he need not know that the weapon was specifically covered by the NFA's tax and registration requirements. See, *e.g.*, *United States* v. *DeBartolo*, 482 F.2d 312, 316 (1st Cir. 1973); *United States* v. *Freed*, 401 U.S. 601, 607 (1971); *United States* v. *Shilling*, 826 F.2d 1365, 1368 (4th Cir. 1987), cert. denied, 484 U.S. 1043 (1988); *United States* v. *Cowper*, 503 F.2d 130, 132 (6th Cir. 1974), cert. denied, 420 U.S. 930 (1975); *United States* v. *Ranney*, 524 F.2d 830, 832 (7th Cir. 1975), cert. denied, 424 U.S. 922 (1976); *Morgan* v. *United States*, 564 F.2d 803, 805 (8th Cir. 1977); *United States* v. *Thomas*, 531 F.2d 419, 420 (9th Cir.), cert. denied, 425 U.S. 996 (1976); *United States* v. *Mittleider*, 835 F.2d 769, 774 (10th Cir. 1987), cert. denied, 485 U.S. 980 (1988); *United States* v. *Gonzalez*, 719 F.2d 1516, 1522 (11th Cir. 1983), cert. denied, 465 U.S. 1037 (1984). Some courts have held that, in some doubtful cases, the government must prove as well that the defendant had fair notice the weapon was of a type that was subject to the NFA's requirements. *United States* v. *Anderson*, 885 F.2d 1248, 1251 (5th Cir. 1989) (en banc); *United States* v. *Williams*, 872 F.2d 773, 777 (6th Cir. 1989); cf. *United States* v. *Herbert*, 698 F.2d 981, 986 (9th Cir.), cert. denied, 464 U.S. 821 (1983). No court, however, has engrafted onto the statute the further requirement that the defendant must specifically intend to violate the NFA.

a weapon designed to be assembled with equal ease as a short-barrel rifle or as a long-barrel one, respondent satisfies any intent requirement implied by the statute.

3. Respondent argues that Treasury's interpretation of the NFA is entitled to no deference because ambiguities in tax statutes should be construed against the government (see Resp. Br. 21-22) and because the NFA "provides serious criminal penalties for violation, and does not even have a willfulness requirement" (Resp. Br. 22-23).

As we explain in our opening brief (at 15 & n.15), this Court has long held that Treasury regulations "if

found to 'implement the congressional mandate in some reasonable manner,' must be upheld." *United States* v. *Cartwright*, 411 U.S. 546, 550 (1973), quoting *United States* v. *Correll*, 389 U.S. 299, 307 (1967). Accord *Commissioner* v. *Portland Cement Co.*, 450 U.S. 156, 169 (1981) (citing cases); *Helvering* v. *Winmill*, 305 U.S. 79, 83 (1938). Neither case cited by respondent (Resp. Br. 21-22) is to the contrary. *Gould* v. *Gould*, 245 U.S. 151, 153 (1917), involved a pure question of statutory construction, uninfluenced by any administrative construction of the statute. In *White* v. *Aronson*, 302 U.S. 16, 20 (1937), the Court construed a tax statute in favor of the taxpayer where the taxpayer's position was favored both by ordinary commercial use of the language employed in the statute and by consistent administrative practice—apparently known to Congress at the time it re-enacted the statute without material change—until just prior to the rulings. 302 U.S. at 20. In fact, because the established administrative construction of the statute in *White* favored the taxpayer, the case weakens, rather than strengthens, respondent's contention that deference is not owed to Treasury's construction of tax statutes.

Nor is respondent correct in treating the NFA as a criminal statute (see Resp. Br. 22-23, 26 n.34), and thus subject to the rule of lenity. This Court has recognized that the NFA is not a criminal statute, see *Sonzinsky* v. *United States*, 300 U.S. 506, 513 (1937) ("Nor is the subject of the tax described or treated as criminal by [the NFA]."), and that "the acts of making and transferring firearms are broadly defined," *Haynes* v. *United States*, 390 U.S. 85, 88 (1968). Although the NFA's provisions, like those of any tax statute, may be invoked in the context of a criminal

prosecution, that fact alone does not convert it into a criminal statute.[5]

4. Respondent contends (Resp. Br. 26-29) that the government's interpretation of the statute has been inconsistent. Under that interpretation, manufacture or sale of a pistol alone does not constitute manufacture or sale of a short-barrel rifle. Nor does manufacture or sale of individual parts of a short-barrel rifle, such as a rifle stock and barrel, that are insufficient, when assembled, to constitute a complete weapon. However, a manufacturer's marketing of all of the parts of a short-barrel rifle, such as a pistol with a readily attachable rifle stock, constitutes manufacture and sale of a short-barrel rifle under the NFA. Under the consistent administrative interpretation, the fact that a manufacturer makes or sell a longer barrel together with the pistol and attachable rifle stock is irrelevant; the addition of that part, which a consumer can choose to attach to the short-barrel rifle or not, cannot convert sale of a firearm into sale only of a long-barrel rifle. This interpretation dates back at least to 1954; only one document cited by respondent—an unpublished letter written by a BATF official, see note 8, *infra*—suggests otherwise, and long before this litigation began the government made clear that that letter was mistaken.

a. The published revenue rulings relating to the question in this case have consistently adopted the above interpretation. In 1954, the Treasury issued Rev. Rul. 54-606, 1954-2 C.B. 33, which stated that

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[5] Indeed, respondent itself commenced this action as a civil action for a refund of its tax payment pursuant to 26 U.S.C. 7422. See *Thompson/Center Arms Co.* v. *Baker*, 686 F. Supp. 38, 43 (D.N.H. 1988).

"[t]he possession or control of sufficient parts to assemble an operative firearm constitutes the possession of a firearm." That Ruling, whose plain language directly controls this case, applied to *all* firearms under the NFA, not merely short-barrel rifles.[6]

Two years later, in Rev. Rul. 56-296, 1956-1 C.B. 553, the Treasury determined that single-shot pistols whose receivers are "susceptible but not confined to use in either a single shot pistol or rifle" are not firearms under the NFA. That ruling is perfectly consistent with Treasury's position both in Rev. Rul. 54-606 and today. There is no indication that the pistols at issue in Rev. Rul. 56-296 were possessed together with attachable stocks. Possession of a pistol —without simultaneous possession of an attachable stock that would make it operable as a short-barrel rifle—does not constitute possession of a firearm.

As respondent mentions (Resp. Br. 28), in 1959, Treasury determined that possession of a pistol that,

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[6] Respondent cites (Resp. Br. 27) a 1952 regulation, codified at 26 C.F.R. 179.29 (1955), which defined "making of a firearm" as "the production or creating of a firearm by any means, whether by manufacture, putting together of parts, alternation, any combination thereof, or otherwise, and by any process of manipulation or transformation of any other weapon." That definition, by including "by putting together of parts * * * or otherwise," supports our position. Like the present statutory definition of "make" in 26 U.S.C. 5845(i), see pp. 3-4, *supra*, the regulation does not require that *all* parts be put together before a firearm is created. And the term "or otherwise" indicates that the regulation was not intended to give an exclusive list of all of the ways in which a firearm can be made. The Department of the Treasury addressed the subject of complete, but partially unassembled, firearms two years later, in the Revenue Ruling discussed in text.

"[w]ith the pistol barrel removed, * * * can be inserted into a one piece rifle frame with a .22 caliber barrel having a length of over 16 inches" was not possession of a firearm. Rev. Rul. 59-340, 1959-2 C.B. 375. The weapon at issue in that ruling could be assembled only as a pistol or as a "rifle with a * * * barrel having a length of over 16 inches." *Ibid.* Since it was apparently not possible to assemble the weapon as a rifle with a barrel of less than 16 inches, it was not a firearm under the NFA. Had respondent manufactured a pistol with an attachable stock and a long barrel such that it was not functional as a rifle unless *both* the shoulder stock *and* the long barrel were attached, Rev. Rul. 59-340 would control this case. The crucial distinction overlooked by respondent is that the weapon at issue here is fully functional as a short-barrel rifle, and thus is a firearm under the NFA.

In 1961, Treasury issued two rulings that continued its consistent interpretation of the statute and apply directly to this case. In Rev. Rul. 61-45, 1961-1 C.B. 663, the Department ruled that a pistol "having a barrel less than 16 inches in length with an attachable shoulder stock affixed, *or held by the possessor of such a weapon*, is a short barrel rifle and, hence, within the purview of the National Firearms Act" (emphasis added). In Rev. Rul. 61-203, 1961-2 C.B. 224, Treasury restated the principle of Rev. Rul. 61-45 and added that a pistol that "has a barrel of 16 inches or more in length" is not a firearm, "even though such weapon has an attached or attachable shoulder stock." The two 1961 rulings thus establish that pistols with short barrels and attachable shoulder stocks are firearms, while pistols with long barrels (greater than 16 inches) and attachable shoulder

stocks are not firearms. The weapons at issue here are plainly within the former category.[7]

b. Respondent contends that Treasury's position has not been consistent because Rev. Rul. 54-606, the first ruling to address the "combination of parts" issue under the NFA, was withdrawn in 1972. In that year, Treasury determined in Rev. Rul. 72-178, 1972-1 C.B. 423, that Rev. Rul. 54-606, along with some 126 other revenue rulings, was "obsolete." That position, however, did not "repudiate[]" the substantive rule announced in Rev. Rul. 54-606, as respondent contends. Resp. Br. 38.

First, Treasury did not withdraw or declare obsolete the two Revenue Rulings that are most relevant to this case—Rev. Ruls. 61-45 and 61-203. Those two rulings specifically address the issue here—the classification of pistols held together with parts sufficient to convert them into short-barrel rifles. Without regard to Rev. Rul. 54-606, those two rulings alone establish that the interpretation at issue here is long-standing and consistent.

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[7] Respondent repeatedly comments (Resp. Br. 2 n.2, 14, 29 n.38, 33 n.4) that Treasury has exempted from the NFA registration and tax requirements a number of firearms that the Secretary has determined are "collector's item[s] and [are] not likely to be used as * * * weapon[s]." 26 U.S.C. 5845(a). The question whether the Secretary should have exempted respondent's Contender weapon was not litigated in this case and is not before this Court. Moreover, the fact that the Secretary has exempted certain weapons that respondent claims to be similar to his Contender pistol with conversion kit suggests, if anything, the consistency of the administrative interpretation of the statute. If the exempted weapons were not otherwise thought to be NFA "firearms," no purpose would have been served by exempting them from the NFA's requirements.

Second, as Rev. Rul. 72-178, 1972-1 C.B. 423, makes clear, one of the bases for the declaration of obsolescence was that Rev. Rul. 54-606, like the other 126 itemized rulings, was "inapplicable *either in whole or in part* to the current law and regulations" (emphasis added). Rev. Rul. 54-606 applied not only to pistols sold with attachable parts for conversion to short-barrel rifles, but also more generally to combinations of parts sufficient to assemble any firearm. In the Gun Control Act of 1968, Pub.L. No. 90-618, Tit. II, § 201, 82 Stat. 1231, Congress incorporated in the statutory definitions of "machinegun" and "destructive device" language making clear that those terms include a combination of parts that can be assembled, respectively, into a machinegun or a destructive device. Thus, Rev. Rul. 54-606 was in part superseded by the specific statutory terms of the 1968 statute *with respect to machineguns and destructive devices*. By declaring Rev. Rul. 54-606, but not Rev. Ruls. 61-45 and 61-203 "obsolete," Treasury simply recognized that fact. Its action did not in any way repudiate the interpretation embodied in the "non-obsolete" portion of Rev. Rul. 54-606 and carried forward in Rev. Ruls. 61-45 and 61-203.

Finally, a Treasury determination that a previous ruling is "obsolete" does not amount to a repudiation of the substance of the prior ruling. As Treasury explained when initiating its process of periodic review of past rulings, a revenue ruling is declared obsolete when it is "not * * * determinative with respect to future transactions." Rev. Proc. 67-6, 1967-1 C.B. 576, 578. A ruling may attain that status, *inter alia*, "because of amendment of the statute, revision of the regulations, application of court decisions, etc." *Ibid.* Treasury expressly cautioned that "[t]he public an-

nouncement that a particular ruling is [obsolete] *does not necessarily mean that the conclusion or the underlying rationale has no current applicability.*" *Ibid.* (emphasis added). See also 4 *BATF Quarterly Bulletin* at vi. (1990). By contrast, a ruling is "revoked" when "the position in the previously published ruling is not correct and the correct position is being stated in the new ruling. Rulings which have been revoked have no further effect." *Ibid.* Rev. Rul. 54-606 has never been "revoked."

c. Respondent cites (Resp. Br. 3-4, 29-30) a number of informal exchanges of unpublished letters between private parties and BATF officials in support of his contention that the administrative interpretation of the NFA has been inconsistent. Even if those letters contradicted Treasury's interpretation of the NFA as found in published rulings—and a careful reading of most of them discloses a basically consistent course of administrative interpretation [8]—such

[8] A number of the letters cited by respondent appear to have involved either manufacture of complete, long-barrel rifles (C.A. App. 31), or the sale of a shoulder stock for a pistol, without simultaneous sale of the other parts of a weapon (C.A. App. 35-36, 38), neither of which are NFA firearms. The only letter cited by respondent that appears to depart from Treasury's consistent position regarding complete, but partially unassembled, weapons is an unpublished, 1973 letter from the Assistant Director of Technical and Scientific Services at BATF. See C.A. App. 34. The letter states that the sale of an unregistered "Sportsmans Kit, consisting of a Colt Trooper revolver with a barrel length of 16 inches, an interchangeable 4-inch barrel and the RMAC gun rest" would not violate the NFA. That letter was written by a subordinate agency official and contradicted the official administrative interpretation expressed in published rulings long before the letter was written. In addition, respondent was on notice that the letter contradicted the agency's formal position before this litigation was commenced. When respondent's counsel brought the letter to the attention of Treasury officials in 1985, he was informed by letter that "[t]he position stated in the 1973 letter involving the sportsman's kit is not consistent with ATF's published rulings or the case law before or after 1973, and is incorrect." C.A. App. 44.

unpublished, informal letters, often written by subordinate agency officials, could not disprove our contention that Treasury's administrative interpretation has been consistent. Under 26 U.S.C. 6110(j)(3), "[u]nless the secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent." See 27 C.F.R. 71.41(d)(iii)(B) (published revenue rulings—but not unpublished rulings or decisions—"may be cited and relied upon.") Cf. *Rowan Cos., Inc.* v. *United States*, 452 U.S. 247, 261 n.17 (1981). In addition, as to the letters cited by respondent, the context in which they were written—including the individuals to whom they were addressed, the questions asked by these individuals, and the nature of contemporaneous or prior conversations or letters between the parties that might clarify the meanings of the letters—is in many cases unclear, making their interpretation particularly perilous.

5. Respondent argues that our interpretation of the statute does not draw appropriate distinctions among different sorts of weapons. For example, respondent repeatedly notes (Resp. Br. 3, 6, 7, 9 n.10, 14 n.16, 15, 28) that, under our interpretation, a conventional, long-barrel rifle is not a short-barrel rifle under the NFA, despite the fact that it can be made into one by sawing off the barrel. Similarly, respondent states in a number of places (Resp. Br. 3, 6, 12-13, 16-17, 18-19, 20-21) that, under our interpretation, separate marketing of a complete Contender pistol and a complete Contender long-barrel

rifle does not constitute sale of an NFA "firearm," while marketing of a Contender pistol together with one part of a Contender rifle—the shoulder stock—does constitute sale of an NFA "firearm."

The short answer to respondent's contention, as our opening brief explains (at 15 & n.15), is that any effort to administer a complex tax collection and registration scheme, such as the NFA, requires the drawing of lines.[9] Congress has entrusted the administration of the NFA to the Department of the Treasury. See 26 U.S.C. 7805; 37 Fed. Reg. 11,696 (1972) (delegation of regulatory authority to BATF). Consequently, Treasury's efforts to draw the necessary lines "in this area of limitless factual variations," *United States* v. *Correll*, 389 U.S. 299, 307 (1967), are entitled to considerable deference.

Treasury's interpretation of the statute is sound. Long-barrel rifles are not NFA firearms, despite the fact that their barrels can be sawed off, for (at least) three reasons. First, the NFA itself plainly subjects only short-barrel rifles—not long-barrel rifles—to taxes and registration as firearms. See 26 U.S.C. 5845(a). Hence, an interpretation of the statute that would make all long-barrel rifles into firearms would be in tension with the statutory language itself. In addition, there is an important distinction

[9] Even respondent concedes that certain lines must be drawn. Thus, respondent would apparently concede that possession of a short-barrel rifle with bolt detached—but easily attachable—would constitute possession of a short-barrel rifle under the NFA. See Resp. Br. 19 n.23. Respondent also argues that "[a] 'conversion kit' to make an UZI short barrel rifle is clearly not analogous to a Contender carbine kit to make a long barrel rifle" (Resp. Br. 29), thus suggesting that respondent might agree that such a UZI conversion kit would be an NFA firarm.

between respondent's weapon and a rifle that has been altered by sawing off the barrel. Once an individual alters a long-barrel rifle by sawing off the barrel, there is presumably no easy way to re-attach the sawed-off portion of the barrel to re-create a weapon that appears not to be subject to the NFA. With respondent's Contender pistol plus conversion kit, however, an individual quickly and easily can convert a non-NFA pistol into an NFA firearm and back by starting with a Contender pistol and then attaching and removing the shoulder stock. Treasury reasonably determined that the easy conversion of such systems into and out of the zone of firearm regulation poses too great a risk that individuals possessing such systems could evade NFA regulation and avoid detection.

Similarly, as we explain in our opening brief (at 16), Treasury reasonably has determined that separate marketing of two complete, assembled weapons—a Contender pistol and a Contender long-barrel rifle—does not constitute marketing of a short-barrel rifle, while marketing of one complete weapon (a Contender pistol) plus some parts of another weapon (the shoulder stock from respondent's kit) does.[10] That distinction is based on the statutory distinction between long- and short-barrel rifles. Manufacture and sale of each weapon separately—as well as separate possession by the manufacturer of both weapons in the course of conducting separate manufacturing and

[10] Contrary to respondent's assumption (Resp. Br. 12-13, 16-17, 19, 20-21), Treasury has never determined that mere possession of two receivers, together with interchangeable parts sufficient to make one complete pistol and one complete long-barrel rifle, could not constitute possession of a firearm.

marketing operations, see Resp. Br. 16—does not constitute manufacture or sale of a firearm.

6. Finally, we note again that Congress has made the determination that short-barrel rifles are subject to the tax and registration provisions of the NFA. Of no relevance here is respondent's apparent belief (Resp. Br. 2, 14) that Congress erred in making that determination because concealable, short-barrel rifles are not useful for criminal purposes. The criminal utility of short-barrel rifles is not at issue in this case. If respondent believes such weapons do not require regulation under the NFA, it should address its legislative proposals to Congress, not this Court. Moreover, respondent's argument in this case would not merely remove its particular pistol plus conversion kit from coverage as an NFA firearm; it would also remove any complete, but partially unassembled, short-barrel rifle (including a highly dangerous semi-automatic weapon) or shotgun, see 26 U.S.C. 5845(a)(1), or "any other weapon" as defined in the NFA, see 26 U.S.C. 5845(a)(5), from coverage as an NFA firearm.[11] Despite respondent's evident disdain (Resp. Br. 14) for Congress's desire to tax and register such

[11] Respondent asserts that "[t]he [Federal Circuit's] opinion is not a serious threat to the enforcement of the NFA because it does *not* require that just *any* NFA 'firearm' be assembled" and "[t]he opinion does not address other NFA 'firearms' except to acknowledge that some types (such as machinegun[s]) need not be assembled." Resp. Br. 14. Yet, the reasoning advanced by respondent and adopted by the court of appeals makes no distinction between the various categories of NFA firearms—rifles, shotguns, and "any other weapon" as defined in the NFA—that do not have "combination of parts" language in their definitions. With respect to each of them, a manufacturer could similarly circumvent tax and registration provisions by marketing complete, but partially unassembled, weapons.

weapons, respondent's position would pose a substantial threat to enforcement of the NFA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JANUARY 1992

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No. 91-164

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner

v.

THOMPSON/CENTER ARMS COMPANY,
A Division of the
K.W. THOMPSON TOOL COMPANY, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF AMICI CURIAE SENATORS LARRY E. CRAIG, STEVE SYMMS, AND ROBERT C. SMITH IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE CONTENDER PISTOL AND CARBINE KIT ARE NOT A SHORT BARREL RIFLE UNDER THE STATUTE	4
II. THE ORIGINS OF NFA REGULATIONS AND LACK OF CRIMINAL MISUSE COUNSEL AGAINST AN OVERLY BROAD CONSTRUCTION OF THE DEFINITION OF A SHORT BARREL RIFLE IN THE NFA	11
III. POSSESSION OF THE PISTOL AND CARBINE KIT IS AN INNOCENT ACT, WHILE THE NFA REGULATES MAJOR WEAPONS KNOWN TO BE SUBJECT TO REGULATION AND THUS DISPENSES WITH SCIENTER	16
IV. THE STATUTE SHOULD BE CONSTRUED NARROWLY TO AVOID ANY SECOND AMENDMENT QUESTION	22
CONCLUSION	27

TABLE OF AUTHORITIES

CASES Page

Arkansas Writer's Project, Inc. v. *Ragland*, 481 U.S. 221 (1987) 26
Board of Governors of the Federal Reserve System v. *Dimension Financial Corp.*, 474 U.S. 361 (1986) 26
California v. *Acevedo*, 111 S.Ct. 1982 (1991) 25
Cheek v. *United States*, 111 S.Ct. 604 (1991) 22
Leathers v. *Medlock*, 111 S.Ct. 1438 (1991) 26
Minneapolis Star v. *Minnesota Comr. of Rev.*, 460 U.S. 575 (1983) 26
Morgan v. *United States*, 564 F.2d 803 (8th Cir. 1977) 19
Murdock v. *Pennsylvania*, 319 U.S. 105 (1943) 26
Thomas v. *Collins*, 323 U.S. 516 (1945) 26
United States v. *Anderson*, 885 F.2d 1248 (5th Cir. 1989) (en banc) 20
United States v. *Bass*, 404 U.S. 336 (1971) 22
United States v. *Benner*, 417 F.2d 421 (9th Cir. 1969) 14
United States v. *De Bartolo*, 482 F.2d 312 (1st Cir. 1973) 20
United States v. *Dotterweich*, 320 U.S. 277 (1943) 18
United States v. *Freed*, 401 U.S. 601 (1971) 17
United States v. *Gonzalez*, 719 F.2d 1516 (11th Cir. 1983), *cert. denied*, 465 U.S. 1037 (1984) 19
United States v. *Herbert*, 698 F.2d 981 (9th Cir. 1983), *cert. denied*, 464 U.S. 821 (1983) 21
United States v. *Miller*, 307 U.S. 174 (1939) 25
United States v. *Mittleider*, 835 F.2d 769 (10th Cir. 1987), *cert. denied*, 485 U.S. 980 (1988) 19
United States v. *Ranney*, 524 F.2d 830 (7th Cir. 1975), *cert. denied*, 424 U.S. 922 (1976) 19
United States v. *Shilling*, 826 F.2d 1365 (4th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988) 19
United States v. *Thomas*, 531 F.2d 419 (9th Cir. 1976), *cert. denied*, 425 U.S. 996 (1976) 19
United States v. *Williams*, 872 F.2d 773 (6th Cir. 1989) 21

TABLE OF AUTHORITIES—Continued

Page

United States v. *Verdugo-Urquidez*, 494 U.S. 259, 110 S.Ct. 1056 (1990) 24, 25

U.S. CONSTITUTION

Art. I, § 8, Cl. 15 25
Second Amendment 3, 22, 26

STATUTES

18 U.S.C. 921(a) 5, 16
18 U.S.C. 922(r) 6
26 U.S.C. 5845 ..... *passim*
26 U.S.C. 5848 8
Crime Control Act of 1990, Pub.L. 101-647, § 2204, 104 Stat. 4857 (Nov. 29, 1990) 6
Firearms Owners Protection Act, Pub.L. 99-308, 100 Stat. 449 (May 19, 1986) 5, 9, 22
Gun Control Act of 1968, Pub.L. 90-618, 82 Stat. 1213 (Oct. 22, 1968) 4, 22
National Firearms Act, Pub.L. 474, 48 Stat. 1236 (June 26, 1934) 6
Act of July 16, 1866, ch. 200, § 14, 14 Stat. 173 23
Pub.L. 490, 49 Stat. 1192 (Apr. 10, 1936) 7
Pub.L. 651, 52 Stat. 756 (1938) 7
Pub.L. 274, Ch. 445, 55 Stat., pt. 1, 742 (Oct. 16, 1941) 24
Pub.L. 353, 66 Stat. 87 (1952) 7
Pub.L. 83-591, 68A Stat. 3 (1954) 8
Pub.L. 85-859, 72 Stat. 1275 (1958) 8
Pub.L. 86-478, § 3, 74 Stat. 149 (1960) 8
Pub.L. 99-408, § 10, 100 Stat. 920 (Aug. 28, 1986) 5

CONGRESSIONAL REPORTS

H.R. Rept. No. 1780, 73rd Cong., 2d Sess. (1934) 13
S.Rept. 1444, 73rd Cong., 2d Sess. (1934) 13
H.R. Rept. 2000, 74th Cong., 2d Sess. (1936) 7
H.R. Rept. 1714, 82d Cong., 2d Sess., *reprinted in* 1952 U.S. Code Cong. & Admin. News 1456 8
H.R. Rept. 1337, 83rd Cong., 2d Sess., *reprinted in* 1954 U.S. Code Cong. & Admin. News 4019 ..... 7, 8

TABLE OF AUTHORITIES—Continued

	Page
S. Rept. No. 1303, 86th Cong., 2d Sess., *reprinted in* 1960 U.S. Code Cong. & Admin. News 2111	9
The Right to Keep and Bear Arms, Report of the Subcommittee on the Constitution, Senate Judiciary Committee, 97th Cong., 2d Sess. (1982)	23
HEARINGS	
National Firearms Act: Hearings before the Committee on Ways and Means, U.S. House of Rep., 73rd Cong., 2d Sess. (1934)	12
To Regulate Commerce in Firearms: Hearings Before a Subcommittee of the Committee on Commerce, U.S. Sen., 73rd Cong., 2d Sess. (1934)	13
Anti-Crime Program: Hearings Before Subcommittee No. 5, Committee on the Judiciary, U.S. House of Rep., 90th Cong., 1st Sess. (1967)	14
Federal Firearms Act: Hearings Before the Subcommittee to Investigate Juvenile Delinquency, Judiciary Committee, U.S. Sen., 90th Cong., 1st Sess. (1967)	14
OTHER AUTHORITIES	
78 CONG. REC. 11400 (June 13, 1934)	13
H. Williamson, Winchester: *The Gun That Won The West* (1952)	11
J. Grant, *Boys' Single Shot Rifles* (New York 1967)	11
132 CONG. REC. H1700 (Apr. 9, 1986)	11
J. Wright and P. Rossi, ARMED AND CONSIDERED DANGEROUS (1986)	14
STATE LAWS AND PUBLISHED ORDINANCES: FIREARMS (BATF 1989)	14
FBI Uniform Crime Reports (1990)	15
A. Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131 (1991)	25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-164

UNITED STATES OF AMERICA,
Petitioner

v.

THOMPSON/CENTER ARMS COMPANY,
A Division of the
K.W. THOMPSON TOOL COMPANY, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF OF AMICI CURIAE SENATORS LARRY E. CRAIG, STEVE SYMMS, AND ROBERT C. SMITH IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE

The Amici Curiae are members of the United States Congress who support the position of the respondent in this case because they have a special interest in protecting the rights of law-abiding persons who choose to own firearms. Each of the amici have sponsored and/or supported

legislation in this area, and have expressed their interpretations of such legislation to appropriate members of BATF. This brief is desirable to alert this Court to the special concerns of members of Congress which will not be adequately set forth in the brief of the respondent.

Senators Symms, Craig, and Smith (the latter two were then representatives) were strong supporters of the Firearms Owners' Protection Act. Pub. L. 99-308, 100 Stat. 449 (May 19, 1986). Senator Craig explained or participated in formulations of terms of relevance here which would be enacted as amendments to the National Firearms Act.

By letter dated September 13, 1985, Senator (then representative) Smith (along with Senator Warren Rudman) wrote to the Deputy Assistant Secretary (Operations), Department of the Treasury, who was then reviewing the opinion of the BATF Director concerning the Contender pistol and carbine kit. The senators stated that the items are not a short barrel rifle. This letter was also signed by then Senator Gordon Humphrey.

By letter dated June 17, 1986 to the BATF Director, Senator (then representative) Craig addressed a related issue, contending that single shot pistols and rifles which use the same receivers are not NFA firearms. This letter was also signed by Representatives Tommy Robinson, Don Young, John Dingell, Harold Volkmer, and Henson Moore.

SUMMARY OF ARGUMENT

The Contender pistol and carbine kit are not a rifle having a barrel less than 16 inches in length as those terms are used in 26 U.S.C. § 5845. These items are intended to be used as either a pistol or as a rifle with a 21″ barrel. A rifle is a weapon which has been "made" and is "intended" to be fired from the shoulder.

By contrast, three other types of "firearms" in § 5845 are defined in terms of combinations of parts; two of those definitions in addition require that the parts be designed and/or intended to be assembled as firearms as defined. "Rifle" is not defined in terms of a combination of parts, and Treasury concedes that a complete Contender pistol and a complete carbine, each with its own receiver, is not a short barrel rifle.

Even though short barrel rifles are restricted under the National Firearms Act, they were placed there for reasons which had little to do with criminal misuse. Current statistics show little criminal preference for such weapons. This counsels against an overly broad construction of the definition of a short barrel rifle.

The National Firearms Act regulates major weapons which should be known to be subject to control, and thus dispenses with scienter. By contrast, possession of the pistol and carbine kit, intended to be made only as a rifle with a 21″ barrel, is an innocent act. Since most circuits do not require a showing of knowledge of the legal character of a firearm, tens of thousands of persons who now possess pistols and carbine kits would become felons overnight if this Court interprets the statute in an overly broad manner.

Finally, the Second Amendment protects the right of the people to keep and bear arms. By construing the statute not to encompass the firearms at issue, the Court may avoid any constitutional issue of whether the stringent taxation and registration requirements of the National Firearms Act infringe on the right to keep arms.

ARGUMENT

I. THE CONTENDER PISTOL AND CARBINE KIT ARE NOT A SHORT BARREL RIFLE UNDER THE STATUTE

The Contender pistol and carbine kit are not "a rifle *having* a barrel or barrels of less than 16 inches in length" as those terms are used in 26 U.S.C. § 5845 (a)(3). As enacted in 1954 and amended in 1958 and 1968, § 5845(c) provides:

> the term 'rifle' means a weapon designed or redesigned, *made or remade*, and *intended* to be fired from the shoulder and designed or designed and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge. (Emphasis added.)

A Contender pistol and carbine kit do not fit the above definition. They are not a "weapon" which is "made" and "intended to be fired from the shoulder" with a barrel of less than 16", nor can they be readily "restored" to something they have never been. As § 5845(i) further clarifies: "The term 'make' and the various derivatives of such word, shall include manufacturing . . . , *putting together*, altering, any combinations of these, or otherwise producing a firearm." The definition of "make" as "putting together" would apply to a rifle, and not to a firearm defined as a combination of parts, which thereby need not be put together.

26 U.S.C. § 5845(b), enacted as a provision of the Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1213 (Oct. 22, 1968), provides in part: "The term 'machinegun' means . . . any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person." This is an absolute liability definition in that it does not require

any intent to assemble the parts into a machinegun. No such definitional language exists for the term "rifle."

26 U.S.C. § 5845(f), also enacted in 1968, defines a "destructive device" in part as follows:

> . . . (2) any type of weapon by whatever name known which will, or which may be *readily converted* to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun . . .; and (3) *any combination of parts either designed or intended* for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and *from which a destructive device may be readily assembled.* The term "destructive device" shall not include any . . . rifle which the owner intends to use solely for sporting purposes. (Emphasis added.)

Under this definition, a combination of parts from which one could readily assemble a nonsporting rifle with a bore of more than one-half inch, is not a destructive device unless designed or intended to be so used. Once again, no such definition exists for the term "rifle."

In the Firearms Owners' Protection Act of 1986, Congress enacted 26 U.S.C. § 5845(a)(7), incorporating 18 U.S.C. § 921(a)(24), which provides:

> The terms 'firearm silencer' and 'firearm muffler' mean any device for silencing, muffling, or diminishing the report of a portable firearm, *including any combination of parts*, designed or redesigned, and *intended for use in assembling or fabricating* a firearm silencer or firearm muffller, and any part intended only for use in such assembly or fabrication.[1]

[1] Emphasis added. Moreover, in connection with a new provision in 18 U.S.C. § 921(a)(17)(B) concerning certain ammunition, the following definition was enacted: "'handgun' means any firearm including a pistol or revolver designed to be fired by the use of a single hand. *The term also includes any combination of parts from*

Under this definition, to be a silencer, a combination of parts must be both designed *and* intended for such use.

By such enactments,[2] Congress has clearly expressed its intent that a combination-of-parts definition does not apply to rifles, and that, even where it applies to certain NFA firearms, an intent requirement may also exist. The Contender pistol and carbine kit are explicitly intended to be assembled only as a pistol or as a rifle with a 21" barrel. Indeed, BATF concedes that possession of a complete pistol and a complete carbine (each with its own separate receiver) is not an NFA firearm, and thus that a combination-of-parts definition does not apply. Yet nothing in the statute sanctions BATF's position that a combination-of-parts definition applies if only one receiver is present for use in both the pistol and the carbine.

In contrast with other firearms, rifles were never defined in an expansive manner, and have been steadily removed from NFA controls.

The 1934 Act defined a "firearm" as including a "rifle *having* a barrel of less than eighteen inches in length . . . or any other *weapon*, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person. . . ." National Firearms Act, Pub. L. 474, 48 Stat. 1236 (June 26, 1934). Thus, to be a "firearm," a rifle had to "hav[e]"—in the present tense—a barrel of less than 18 inches and had to be a "weapon," thereby excluding mere parts not usable

which a handgun can be assembled." Pub. L. 99-408, § 10, 100 Stat. 920 (Aug. 28, 1986) (emphasis added).

[2] In the Crime Control Act of 1990, Congress amended the Gun Control Act to provide that "it shall be unlawful for any person to *assemble from imported parts any semiautomatic rifle* or any shotgun" which has not been approved for importation. 18 U.S.C. § 922(r) (emphasis added). In other words, a "rifle" does not exist until it is "assemble[d]"—that is, put together so that a complete, functioning weapon results—from "parts" (in this case, "imported parts").

as a weapon and intended for assembly only as a pistol or as a rifle with a barrel over 18 inches.

A 1936 amendment added that a firearm "does not include any rifle which is within the foregoing provisions solely by reason of the length of its barrel if the caliber of such rifle is .22 or smaller and if its barrel is sixteen inches or more in length. . . ." Pub. L. 490, 49 Stat. 1192 (Apr. 10, 1936). This exempted ".22 and less caliber hunting rifles . . . which are in fact less susceptible of being concealed on the person than other types of rifles" not encompassed within the NFA. H.R. Rept. 2000, 74th Cong., 2d Sess., 1 (1936).

In 1938, the Act was again amended to provide a reduced tax "on any gun with two attached barrels, twelve inches or more in length, from which only a single discharge can be made from either barrel without manual reloading. . . ." Pub. L. 651, 52 Stat. 756 (1938). This illustrates that NFA firearms were not implicitly defined as mere combinations of parts, since here the barrels had to be "attached." This provision survives in reworded form as "weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length," 26 U.S.C. § 5845(e).[3]

The current definition of "make" in § 5845(i) originated in 1952. Pub. L. 353, 66 Stat. 87 (1952) ("the making in the United States of any firearm (whether by manufacture, putting together, alteration, any combination thereof, or otherwise). . . ."). The committee report explained:

> Section 1 of the bill brings such sawed-off shotguns under the act by taxing the action of sawing off the barrel or otherwise making such firearm, by requir-

[3] The rewording was enacted in 1954 to clarify that a combination rifle and shotgun, which was considered sporting, but not a double barrel shotgun, would qualify for the reduced tax. H.R. Rept. 1337, 83d Cong., 2d Sess., *reprinted in* 1954 U.S. Code Cong. & Admin. News 4019, 4539.

> ing the filing of a declaration of intention and payment of the tax prior to such making, and by imposing the penalties of the act upon those making such firearms without first paying the tax and filing the declaration of intention. H.R. Rept. No. 1714, 82d Cong., 2d Sess., at 2, *reprinted in* 1952 U.S. Code Cong. & Admin. News p. 1456.

In 1954, "rifle" was defined to include only "a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed and made to use the energy of the explosive in a fixed metallic cartridge. . . ." Pub. L. 83-591, 68A Stat. 3 (1954), codified at 26 U.S.C. § 5848 (1954). This excluded mere parts not "made" into a "weapon" which is "intended to be fired from the shoulder," as well as rifles which did not fire fixed metallic cartridges. This definition was passed "in pursuance of the clearly indicated congressional intent to cover under the National Firearms Act only such modern and lethal weapons . . . as could be readily and efficiently used by criminals and gangsters." H.R. Rept. No. 1337, 83d Cong., 2d Sess. 524, *reprinted in* 1954 U.S. Code Cong. & Admin. News 4019, 4542.

In 1958, the terms "designed and made" were replaced with "designed or redesigned and made or remade," apparently to include a rifle which was not originally designed and made to fire a fixed metallic cartridge, but was redesigned and remade to do so. Pub. L. 85-859, 72 Stat. 1275, 1427 (1958).

In 1960, Congress altered the definition of "firearm" to include "a rifle having a barrel or barrels of less than 16 inches in length, or any weapon made from a rifle or shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches. . . ." Pub. L. 86-478, § 3, 74 Stat. 149 (1960). The Senate report explained that rifles with barrels between 16 and 18 inches "are primarily sporting guns," and that "a number of popular sporting rifles have a barrel length just slightly under 18 inches with the

result that they are classified as a 'firearm' subject to these special taxes and control provisions. It is not believed that these guns constitute a type of weapon, such as a sawed-off rifle or shotgun, which is likely to be used by the criminal element." S. Rept. No. 1303, 86th Cong., 2d Sess., at 3, *reprinted in* 1960 U.S. Code Cong. & Admin. News 2111, 2113. As the Court of Appeals noted: "The amendment is relevant as an example of Congress once again turning its attention to the type of rifles it wanted to regulate under the NFA and once again, declining to cover combinations of rifle parts." (Pet. App. 10a n.3.)

The 1968 Act, while adding the "readily restored" language, did not add combination-of-parts language to the "rifle" definition as it did with the "machinegun" and "destructive device" definitions. Moreover, it provided:

> The term 'firearm' shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon. 26 U.S.C. § 5845(a).

Pursuant to this provision, BATF has removed hundreds of short barrel rifles (including semiautomatic pistols with instantly attachable shoulder stocks) from the NFA. (C.A. App. 48-49; Ex. 2, App. to Mot. of Pl. for Sum. J., A47-A57.

Finally, as noted *supra*, the Firearms Owners' Protection Act of 1986 enacted combination-of-parts language in a definition of "silencer," but Congress again did not add such language to the definition of "rifle." In fact, Senator Hatch, floor manager of the Act, wrote a letter in 1985 to the BATF Director explictly stating that the Contender pistol and carbine kit are not a short barrel rifle. (Ex. 5, App. to Pl. Mot. for Sum. J., A134.) Senator Hatch's letter is worth quoting at length:

For years several of my constituents and other interested parties have manufactured kits which convert certain pistol receivers into a single-shot carbine. These manufacturing activities were undertaken in reliance on earlier written rulings of the Bureau of Alcohol, Tobacco and Firearms which established that interchangeable barrels did not subject these firearms to the requirements of the National Firearms Act. A few of these earlier rulings are attached.

These rulings from 1971, 1973, 1976, and 1983 make sense because the mere possibility that legal firearms, as both the pistol and the fully assembled carbine made from the same receiver would be, might be reassembled into an illegal firearm should not subject the legal pistol and the legal carbine to National Act regulation. The particular finely tooled firearms in question, namely Contender pistols are designed solely for hunting or target shooting. As you have recommended in the past, it is certainly appropriate for the manufacturer of these pistol-carbine conversion kits to notify the purchaser that attaching the carbine stock to a firearm with a barrel length of less than sixteen inches would violate the National Act.

It has come to my attention that the Bureau intends to revoke these rulings and make the mere possession of the conversion parts for the Contender pistol and carbine illegal, even though these parts are intended to be used only as a legal pistol or a legal carbine. This could penalize many sportsment who have relied on earlier BATF rulings when purchasing these convertible firearms. Moreover banning the conversion kits or convertible firearms would have, to my knowledge, little or no effect on crime because these firearms are rarely, if ever, used feloniously.

In light of these considerations, I would respectfully respect that you reconsider any intention to revoke the earlier rulings.[4]

[4] The rulings above are set forth in C.A. App. 31-38.

This demonstrates that the Senate floor manager of the latest comprehensive amendments to the Gun Control Act understood the NFA not to apply to the Contender pistol and carbine kit; that many carbine kits have been produced and are used by sportsmen; and that BATF was on notice of this congressional interpretation, yet sought no combination-of-parts language in the definition of "rifle" as it did for silencer. 132 CONG. REC. H1700 (Apr. 9, 1986). Indeed, BATF itself does not contend that a combination-of-parts definition exists here if two receivers are present.

In sum, the Contender pistol and carbine kit are not encompassed in the NFA. The overall statutory scheme and the legislative history demonstrate that these sporting arms are precisely the types of weapons Congress intended *not* to include in the NFA's stringent requirements.

II. THE ORIGINS OF NFA REGULATIONS AND LACK OF CRIMINAL MISUSE COUNSEL AGAINST AN OVERLY BROAD CONSTRUCTION OF THE DEFINITION OF A SHORT BARREL RIFLE IN THE NFA

Before 1934, short barrel rifles for sporting purposes were in wide use. The Winchester Model 92 (14″ barrel) was preferred by trappers,[5] and others enjoyed the Stevens pocket rifle.[6] There were buggy rifles and bicycle rifles, which were convenient to carry.[7] A great number,

[5] They cost only $18.00 in 1892. "In running a line of traps for smaller animals these men would not infrequently catch a wolf or a bear, and a Model 92 with a fourteen-inch barrel was effective in dealing with these animals." By 1932—two years before the National Firearms Act restricted the Trapper—Winchester presented its one millionth Trapper to Secretary of War Patrick Hurley. H. Williamson, WINCHESTER: THE GUN THAT WON THE WEST 159 (1952).

[6] J. Grant, BOY'S SINGLE SHOT RIFLES *passim* (New York 1967).

[7] *Id.*

of course, were boys' rifles, with shoulder stocks as well as short barrels.[8] Whether designed for adult convenience or children's usage, small rifles were associated with hunting and recreation.[9]

As originally proposed in 1934, the bill that became the National Firearms Act would have defined "firearm" to include a pistol, short barrel shotgun, "or any other firearm capable of being concealed on the person," or a machine gun.[10] Short barrel rifles were not expressly included.

Attorney General Homer S. Cummings stated that "this bill does not touch in any way the owner, or possessor, or dealer in the ordinary shotgun or rifle." The interests of "the sportsman who desires to go out and shoot ducks, or the marksman who desires to go out and practice" were completely protected.[11] The following discussion ensued:

> Mr. [Harold] KNUTSON. General, would there be any objection, . . . after the word "shotgun" to add the words "or rifle" having a barrel less than 18 inches? The reason I ask that is I happen to come from a section of the State where deer hunting is a very popular pasttime in the fall of the year and, of course, I would not like to pass any legislation to forbid or make it impossible for our people to keep arms that would permit them to hunt deer.[12]

The obvious purpose of adding short barrel rifles was to prevent longer barrel rifles from being interpreted as "any other firearm capable of being concealed on the person," and to set an objective standard for length. This

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[8] *Id.*

[9] *Id.*

[10] National Firearms Act: Hearings before the Committee on Ways and Means, U.S. House of Rep., 73rd Cong., 2nd Sess. at 1 (1934).

[11] *Id.* at 6.

made particular sense as long as pistols and revolvers were being expressly regulated. No one claimed that restricting short barrel rifles had law enforcement value. The Knutson amendment clarified that "a rifle of 18 inches or more would not be a firearm under this definition." [13]

A compromise was reached which excluded pistols and revolvers from the bill,[14] although Congress neglected to remove short barrel rifles from the bill as well. The anomalous result was that large and small rifled arms—long barrel rifles and pistols—were not regulated by the NFA, but medium sized rifled arms—short barrel rifles—were regulated.

H.R. Rept. 1780, 73rd Cong., 2d Sess., 1 (1934) explained: "Limiting the bill to the taxing of sawed-off guns and machine guns is sufficient at this time. It is not necessary to go so far as to include pistols and revolvers and sporting arms." S. Rept. 1444, 73rd Cong., 2d Sess., 1 (1934) repeated this statement. The capacity of a sporting arm to be sawed off or otherwise converted did not make it an NFA firearm.

In House debate, it was agreed that "sawed-off . . . rifles," and not "the ordinary sporting rifle," would be subject to the NFA. 78 CONG. REC. 11400 (June 13, 1934) (statements of Reps. Bertrand Snell and Robert Doughton). The bill was approved by those "interested in sport and sporting arms, from the standpoint of the use of those arms for ordinary purposes." *Id.* at 12555 (June 18, 1934) (exchange between Reps. George W. Blanchard and Samuel B. Hill).

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[12] *Id.* at 13.

[13] *Id.* at 95-96 (Statements of Congressman Samuel B. Hall and Assistant Attorney General Keenan).

[14] *See* To Regulate Commerce in Firearms: Hearings Before a Subcommittee of the Committee on Commerce, U.S. Sen., 73rd Cong., 2nd Sess. at 58 (1934).

The NFA was not comprehensively amended until passage of the Gun Control Act of 1968. The legislative history of the 1968 Act reveals little mention of short barrel rifles (though much on machineguns, sawed-off shotguns and destructive devices).[15] No link between short barrel rifles and crime was strongly suggested by anyone in Congress in that period.[16]

While most states ban or severely regulate machineguns and sawed off shotguns, in 1969, *United States* v. *Benner*, 417 F.2d 421, 224-25 n.10 (9th Cir. 1969) listed 44 states and the District of Columbia as jurisdictions where a sawed-off rifle could be legally possessed, and only six states where possession thereof could be a crime. About half of the state legislatures and the District of Columbia currently treat the short barrel rifle no differently than long barrel rifles.[17] Those with special restrictions may have adopted them just because the National Firearms Act did so.

Criminologists James Wright and Peter Rossi have found that many criminals are apt to saw off a shotgun,

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[15] When asked for statistics concerning the sources of "sawed-off shotguns and sawed-off rifles," IRS Commissioner Sheldon Cohen filed a report stating that "sawed-off shotguns can be made from standard shotguns with relative ease. . . ." Anti-Crime Program: Hearings Before Subcommittee No. 5, Commitee on the Judiciary, U.S. House of Rep., 90th Cong., 1st Sess., 559, 568 (1967).

[16] In Federal Firearms Act: Hearings Before the Subcommittee to Investigate Juvenile Delinquency, Judiciary Commitee, U.S. Senate, 90th Cong., 1st Sess., 968 (1967) John M. Schooley, special investigator for the Treasury Department, testified: "In my 20 years' experience enforcing provisions of this act, I have never had the privilege of registering a machinegun, sawed-off rifle or shotgun, possessed by a person known to operate outside the law. I have, however, registered many saddle guns, many short-barreled caliber .22 rifles and combination .22 and .410 arms and other such firearms for law-abiding citizens."

[17] *See* STATE LAWS AND PUBLISHED ORDINANCES: FIREARMS *passim* (BATF 1989).

but those few who use rifles are more apt to leave them unmodified. J. Wright and P. Rossi, ARMED AND CONSIDERED DANGEROUS 95 (1986).[18] Based on research interviews supported by the National Institute of Justice with predatory, violent felons, they found the following percentage of guns preferred by criminals:

1. What kinds of gun(s) have you *ever used* to commit crimes?

Handgun	90
Sawed-off shotgun	27
Regular shotgun	16
Sawed-off rifle	7
Regular rifle	10
Zipgun (homemade)	3
All other	4

* * * *

4. What kind of [weapon] have you used *most frequently* in committing crimes?

Handgun	85
Sawed-off shotgun	9
Regular shotgun	3
All other guns	3

The FBI Uniform Crime Reports 12 (1990) states: "Of those murders for which weapons were reported, 50 percent were by handguns, 6 percent by shotguns, and 4 percent by rifles."[19] Although the Reports do not distinguish rifles by barrel length, it is obvious that rifles of all kinds were used less than shotguns and far less than handguns.

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[18] Exhibit 2, Appendix to Motion of Plaintiff for Summary Judgment, A61.

[19] The same reference gives the following statistics for murder victims, type of weapons used, in 1990:

Handguns	9,923
Rifles	741
Shotguns	1,237

In sum, the sawed-off rifle appears used in crime less than any other firearm. Less accurate than a long barrel rifle and less concealable than a handgun, a short barrel rifle has no particular advantage. While short barrel rifles are restricted under the NFA, the legislative history and criminological data suggest that the NFA definitions should not be stretched to include the product at issue here.

III. POSSESSION OF THE PISTOL AND CARBINE KIT IS AN INNOCENT ACT, WHILE THE NFA REGULATES MAJOR WEAPONS KNOWN TO BE SUBJECT TO REGULATION AND THUS DISPENSES WITH SCIENTER

If this Court, as the government requests, recognizes a combination-of-parts definition for rifle where only one receiver is present, what intent standard will it impose? The three types of firearms with combination-of-parts language in their definitions also have three different intent standards. A combination of parts from which a machinegun can be assembled is sufficient, without further intent, to be a machinegun. 26 U.S.C. § 5845(c). To be a combination of parts constituting a destructive device, the parts must be designed *or* intended to be so assembled, *and* must be capable of being readily assembled. 26 U.S.C. § 5845(f). For a combination of parts to be a silencer, they must be both designed *and* intended to be assembled as such. 26 U.S.C. § 5845(a)(7), incorporating 18 U.S.C. § 921(a)(24).

If this Court were to embark on the perilous venture of what would be tantamount to legislating a combination-of-parts definition for "rifle" where a pistol with only one receiver is present, where Congress has chosen not to do so, no justification would exist to dispense with an intent standard. Since two types of NFA firearms with combination-of-parts language in their definitions also have intent standards, it would be incongruous to say that a firearm definition with no combination-of-parts language nonetheless should be so construed, but that no

intent is required. Indeed, it would be particularly incongruous since § 5845(c) defines a "rifle" as a "weapon" which has been designed, made, and "intended" to be fired from the shoulder.

Even if this Court recognized a combination-of-parts plus intent component in the definition of "rifle," as exists for destructive device and silencer, the Contender pistol and carbine kit still would not be a NFA firearm because they are *not* intended to be assembled as a short barrel rifle.

The Court of Appeals noted that Contender carbine kits made by other manufacturers have been sold since the late 1960s. (Pet. 2a) Some several tens of thousands of carbine kits have been marketed without any known objection by BATF. C.A. App. 58. BATF in fact advised one Contender kit maker that a shoulder stock and barrel may be freely sold, and that only "the *attaching* of a shoulder stock to a handgun with a barrel of 16 inches or less subjects that firearm" to the NFA. *Id.* at 35-36. Moreover, as noted *supra*, Senator Hatch advised BATF in 1985 that for years several of his constituents had manufactured carbine kits for the Contender, and urged BATF not to reverse its rulings made between 1971 and 1983 that such combinations of parts are not a short barrel rifle. Pl. Ex. 5, App. to Mot. for Sum. J., A134.

Should this Court decide that the Contender pistol and carbine kit constitute an NFA firearm, then many tens of thousands of law-abiding sportsmen will become felons the instant this Court's decision is announced. To be prosecuted, none of these citizens need have any knowledge that their sporting guns are actually NFA firearms.

In *United States* v. *Freed*, 401 U.S. 601, 607 (1971), this Court held that scienter need not be shown in an NFA prosecution. Under long-established case law, "the only knowledge required to be proved was knowledge that the instrument possessed was a firearm. See *Sipes* v.

United States, 321 F.2d 174, 179, and cases cited." 401 U.S. at 607. This Court found the NFA to be like the act in *United States* v. *Dotterweich*, 320 U.S. 277, 284 (1943), where "we approved the penalty though consciousness of wrong-doing be totally wanting." 401 U.S. at 609. This Court continued:

> This is a regulatory measure in the interest of public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act. They are *highly dangerous offensive weapons*, no less dangerous than the narcotics involved in *United States* v. *Balint*, 258 U.S. 250, 254. . . . We say with Chief Justice Taft in that case: ". . . Its manifect purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him." *Id.* (Emphasis added).

In his concurring opinion in *Freed*, Justice Brennan wrote:

> Two factors persuade me that proof of mens rea as to the unregistered status of the grenades is not required. First, as the Court notes, the case law under the provisions replaced by the current law dispensed with proof of intent in connection with this element. Sipes v. United States, supra. Second, the firearms covered by the Act are *major weapons* such as machine guns and sawed-off shotguns; *deceptive weapons* such as flashlight guns and fountain pen guns; and *major destructive devices* such as bombs, grenades, mines, rockets, and large caliber weapons including mortars, anti-tank guns, and bazookas. Without exception, the likelihood of government regulation of the distribution of such weapons is so great that anyone must be presumed to be aware of it. (emphasis added) *Id.* at 616.

By contrast, a single shot Contender pistol and carbine kit, possessed for decades by tens of thousands of sports-

men, are not "highly dangerous offensive weapons" or "major weapons" in the same class as grenades or machineguns. Thus, a sportsman could hardly be presumed to know that a Contender pistol and carbine kit—because they have only one rather than two receivers—are subject to the same regulations as machineguns, bombs, and heroin.

Most circuits maintain that, to be convicted of an NFA offense, one need not know that a gun is an NFA firearm. The government must prove only that a defendant knows an item is a firearm in the general sense, not that it is a "firearm" as particularly defined in the NFA. Indeed, in *United States* v. *Thomas*, 531 F.2d 419, 420 (9th Cir. 1976), *cert. denied* 425 U.S. 996 (1976), where the defendant thought the inoperable item was an antique pistol, the court upheld a jury instruction that "the defendant does not have to know that the firearm is a short barrel rifle." Similarly, *United States* v. *Gonzalez*, 719 F.2d 1516, 1522 (11th Cir. 1983), *cert. denied* 465 U.S. 1037 (1984) held:

> The government does not have to prove that the defendant knew that the weapon in his possession was a "firearm" within the meaning of the statute, or that he knew registration was required. It is a violation of federal law for Defendant Gonzalez to merely possess such a weapon not registered to him. There is no scienter required to be proven.

See also United States v. *Mittleider*, 835 F.2d 769, 774 (10th Cir. 1987), *cert. denied* 485 U.S. 980 (1988) ("the government is not required to prove actual knowledge"); *United States* v. *Shilling*, 826 F.2d 1365, 1368 (4th Cir. 1987), *cert. denied* 484 U.S. 1043 (1988) ("sufficient intent is established if the defendant is shown to have possessed an item 'which he knew to be a firearm within the general meaning of the term.'"), quoting *Morgan* v. *United States*, 564 F.2d 803, 805 (8th Cir. 1977). *Accord*, *United States* v. *Ranney*, 524 F.2d 830, 832 (7th

Cir. 1975), *cert. denied* 424 U.S. 922 (1976). *United States* v. *DeBartolo*, 482 F.2d 312, 316 (1st Cir. 1973) stated:

> The Government need not prove that a defendant knows he is dealing with a drug or a weapon possessing every last characteristic which subjects it to regulation. It is enough to prove that he knows that he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation. If he has such knowledge, and if the particular item is in fact regulated, he acts at his peril. A shotgun in today's society plainly falls within this category.

Nonetheless, the Fifth and Sixth Circuits, and to some extent a recent Ninth Circuit case, have found that the government must prove that the defendant knew the gun was a firearm of the type defined in the NFA. Indeed, in the only *en banc* decision on this issue, *United States* v. *Anderson*, 885 F.2d 1248, 1251 (5th Cir. 1989) (en banc) held that a "conviction should require that the charged party knew it was a 'firearm' in the *Act* sense, not that he (or she) merely knew it was a firearm." *Anderson* added:

> It is one thing for the Court to liken hand grenades to narcotics, as it did in *Freed*; quite another to draw such a parallel where ordinary skeet guns or target rifles are concerned. For the National Firearms Act does not treat conventionally manufactured, normal revolvers, semi-automatic pistols, hunting rifles, or shotguns as anything other than perfectly innocent, legal items. It does not purport to create any presumptions about any such items, or to regulate them in any manner. Common sense tells us that millions of Americans possess these items with perfect innocence. . . .
>
> We think it far too severe for our community to bear—and plaintly not intended by Congress—to subject to ten years' imprisonment one who possesses what appears to be, and what he innocently and reasonably believes to be, a wholly ordinary and legal pistol . . . . *Id.* at 1254.

United States v. *Williams*, 872 F.2d 773, 777 (6th Cir. 1989) agreed that: "Millions of Americans possess different varieties of hand guns and rifles without any consciousness of wrongdoing, or any suspicion that these weapons are as potentially dangerous as narcotics." Thus, the court held that "the government was required to show that defendants knew that a 'firearm' as legislatively defined was being transferred." *Id.*

Finally, *United States* v. *Herbert*, 698 F.2d 981, 986 (9th Cir. 1983), *cert. denied* 464 U.S. 821 (1983), found that "legal firearms are quite prevalent in today's society," and thus the government must prove possession of "a dangerous device of such type as would alert one to the likelihood of regulation. . . ." *But see United States* v. *Thomas, supra.*

Even the most prudent man would be surprised to know that the possession of a single shot sporting pistol, and a kit to make a riflle with a 21″ barrel, is not an innocent act. Thus, if this Court finds that a Contender pistol and carbine kit are an NFA weapon, a defendant could be convicted of a felony in some circuits and not others. Keeping in mind that scienter need not be proven,[20] the acceptance of the government's position would subject tens of thousands of people to felony prosecutions and imprisonment up to 10 years and/or a fine up to $10,000.00 for engaging in what is commonly viewed as an innocent

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[20] As Thompson/Center demonstrates in its brief, it is fundamental that ambiguous taxing statutes are to be construed in favor of taxpayers, and that ambiguous criminal statutes must be construed in favor of the persons subject thereto. Since these principles apply even in the case of statutes that require a showing of willfulness to establish a violation, it is even more imperative that these principles apply to a statute such as the NFA which requires no willfulness and even more so to the firearms at issue here given their innocent appearance.

act. Accordingly, this Court should rule that the pistol and carbine kit are not an NFA firearm.

IV. THE STATUTE SHOULD BE CONSTRUED NARROWLY TO AVOID ANY SECOND AMENDMENT QUESTION

This Court should construe the statute narrowly so as to avoid any issue of whether the NFA's registration requirements and extraordinarily high rates of taxation implicate the Second Amendment to the United States Constitution. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." "It is common ground that this Court, where possible, interprets Congressional enactments so as to avoid raising serious constitutional questions."[21] *Cheek* v. *United States*, 111 S.Ct. 604, 611 (1991).

In enacting the Gun Control Act of 1968 and the Firearms Owners' Protection Act of 1986, Congress enacted combination-of-parts definitions (with different intent standards) for machineguns, destructive devices, and silencers, but refrained from doing so in regard to rifles. Indeed, sensitivity to the Second Amendment protection accorded ordinary rifles, pistols, and shotguns is made clear in the preamble to the 1986 Act:

> CONGRESSIONAL FINDINGS—The Congress finds that—
>
> (1) the rights of citizens—

[21] In *United States* v. *Bass*, 404 U.S. 336, 349-351 (1971), this Court construed a provision of Title I of the Gun Control Act of 1968 in favor of a felon in possession of a firearm, in part to avoid the constitutional problem of whether Congress can prohibit mere possession of a firearm by a felon without an interstate commerce nexus. Similarly, a narrow statutory construction should be applied to avoid the potential constitutional problem of whether the NFA, which is Title II of the Gun Control Act, infringes on the Second Amendment rights of law-abiding citizens.

> (A) to keep and bear arms under the second amendment to the United States Constitution;
>
> (B) to security against illegal and unreasonable searches and seizures under the fourth amendment;
>
> (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and
>
> (D) against unconstitutional exercise of authority under the ninth and tenth amendments;
>
> require additional legislation to correct existing firearms statutes and enforcement policies; and
>
> (2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.[22]

This was not the first time Congress explicitly recognized the right to keep and bear arms since the Second Amendment passed Congress in 1789. To prevent the Southern states from depriving freed slaves of military muskets, pistols, and other firearms, the Freedmen's Bureau Act of 1866 required that the right

> to have full and equal benefit of all laws and proceedings concerning *personal liberty, personal secu-*

[22] Sec. 1(b), Pub. L. 99-308, 100 Stat. 449 (May 19, 1986). The Congressional finding concerning the individual right to keep and bear arms is amply supported by *The Right to Keep and Bear Arms*, Report of the Subcommittee on the Constitution, Senate Judiciary Committee, 97th Cong., 2d Sess. (1982).

rity, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color or previous condition of slavery . . . . Act of July 16, 1866, ch. 200, § 14, 14 Stat. 173, 176-77 (emphasis added.)

In 1941, Congress enacted legislation to authorize the President to requisition broad categories of property with military uses from the private sector on payment of fair compensation. Known as the Property Requisition Act, the legislation included the following provision to reaffirm and protect Second Amendment rights:

> Nothing contained in this Act shall be construed—
>
> (1) to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law), [or]
>
> (2) to impair or infringe in any manner the right of any individual to keep and bear arms . . . .[23]

In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S.Ct. 1056, 1060-61 (1990), this Court made clear that all law-abiding Americans are protected by the Second Amendment as follows:

> "The people" seems to have been a term of art employed in select parts of the Constitution. . . . The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." See also U.S. Const., Amdt. 1, ("Congress shall make no law . . . abridging . . . *the right of the people* peaceably to assemble"); Art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second year *by the People of the*

[23] Pub. L. 274, Ch. 445, 55 Stat., pt. 1, 742 (Oct. 16, 1941).

> *several States*") (emphasis added). While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.[24]

In *United States* v. *Miller*, 307 U.S. 174 (1939), this Court addressed the Second Amendment and the National Firearms Act, holding only that

> In the absence of any evidence [in the trial court] tending to show that possession or use of a [sawed off shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Id.* at 179.

The test this Court thus established was not whether the person in possession of the arm was a member of a formal militia unit,[25] but whether the arm "at this time" was "ordinary military equipment" or its use "could" potentially assist in the common defense.

Since no factual record was made in the trial court that a "sawed-off" shotgun could have militia uses,[26] this

[24] "As with our First Amendment, the text of the Second is broad enough to protect rights of discrete individuals or minorities. . . ." A. Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1162 (1991), article cited as authority in *California v. Acevedo*, 111 S.Ct. 1982, 1992 (1991) (Scalia J., concurring).

[25] This Court's recent holding in *Verdugo-Urquidez*, *supra*, effectively reiterates that this test was clearly correct.

[26] According to Art. I, § 8, cl. 15 of the Constitution, the functions of the militia are: "to execute the Laws of the Union, sup-

Court did not consider whether the tax and related registration requirements of the National Firearms Act violated the Second Amendment. However, this Court has held of a newspaper tax: "It is a license tax—a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the federal constitution." *Murdock* v. *Pennsylvania*, 319 U.S. 105, 113 (1943). *See Thomas* v. *Collins*, 323 U.S. 516, 538-40 (1945) (state may not require registration of persons who exercise First Amendment rights); *Minneapolis Star* v. *Minnesota Comr. of Rev.*, 460 U.S. 575 (1983) (special tax on only a few newspapers invalid). "The Framers perceived singling out the press for taxation as a means of abridging the freedom of the press. . . ." *Id.* at 585 n.7.

A tax is suspect and subject to heightened scrutiny if it targets a small and discrete group of people who choose to exercise a constitutional guarantee that is the target of the tax. *Leathers* v. *Medlock*, 111 S.Ct. 1438 (1991); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987) (both invalidating state sales taxes that taxed certain segments of the media and exempted others).

Ignoring the Second Amendment, the government argues that the NFA was enacted to fight crime and that the definition of "rifle" may be stretched to fit its view of what the law should be. But this Court recognized that:

> Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent. *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 474 U.S. 361, 374 (1986).

press Insurrections, and repel Invasions. . . ." Thus, the militia has a law enforcement function, a quasi law enforcement/quasi military function, and a military function. As a result, those firearms which are "arms" within the meaning of the Second Amendment are those which could be used to fulfill all these functions. .22 caliber pistols and rifles have been used for target practice and training purposes by the Armed Forces throughout the twentieth century.

Even if the alleged purpose of the NFA is considered, the single-shot Contender pistol and carbine kit have absolutely no usefulness for a criminal. More importantly, the NFA is the product of congressional compromises over "gun control." Every word of the NFA has been thoroughly examined and purposefully chosen by Congress. This Court should carry out those choices.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Federal Circuit should be affirmed.

Respectfully submitted,

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